

Bagley Declaration Exhibit B

Exhibit B(1)

1
2 UNITED STATES DISTRICT COURT
3 FOR THE SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 TWELVE SIXTY LLC, ARON
6 MARDEROSIAN and ROBERT
7 MARDEROSIAN,

8 Plaintiffs,

9 -against-

10 Civil Action No.:
11 1:17-CV-01479-PAC

12 EXTREME MUSIC LIBRARY LIMITED,
13 a division of Sony/ATV Music
14 Publishing; EXTREME MUSIC
15 LIMITED; VIACOM INTERNATIONAL
16 INC., NEW CREATIVE MIX INC.,
17 HYPE PRODUCTION MUSIC,
18 Defendants.

19 -----x

20 November 1, 2018
21 1:00 p.m.

22 Deposition of ROBERT H. KOHN, taken by
23 Defendants, pursuant to Notice, held at the law
24 offices of Pryor Cashman, LLP, 7 Times Square, New
25 York, New York, before Judith Castore, a Certified
Livenote Reporter and Notary Public of the State of
New York.

<p style="text-align: right;">Page 2</p> <p>1 2 A P P E A R A N C E S 3 ON BEHALF OF PLAINTIFFS 4 MARDEROSIAN & COHEN, PC 5 1260 Fulton Street 6 Fresno, California 93721 7 559-441-7991 8 BY: MICK MARDEROSIAN, ESQ. 9 mick@mcc-legal.com 10 HEATHER COHEN, ESQ. 11 12 ON BEHALF OF DEFENDANTS - Extreme Music Library 13 Limited, Extreme Music Limited 14 PRYOR CASHMAN, LLP 15 7 Times Square 16 New York, New York 10036 17 212-421-4100 18 BY: DONALD S. ZAKARIN, ESQ. 19 dzakarin@pryorcashman.com 20 ROSS M. BAGLEY, ESQ. 21 rbagley@pryorcashman.com 22 YEVGENIA S. KLEINER, ESQ. 23 ykleiner@pryorcashman.com 24 25 ON BEHALF OF DEFENDANTS - Viacom International, Inc., New Creative Mix, Inc. and Hype Production Music LOEB & LOEB 345 Park Avenue New York, New York 10154 212-407-4000 BY: WOOK J. HWANG, ESQ. whwang@loeb.com ERIN SMITH DENNIS, ESQ. edennis@loeb.com ALSO PRESENT: DAVID J. PRZYGODA, ESQ., Litigation Counsel, Sony Corporation of America</p>	<p style="text-align: right;">Page 4</p> <p>1 KOHN 2 R-O-B-E-R-T H. K-O-H-N, 3 Having been duly sworn by a Notary Public 4 within and for the State of New York, stated an 5 address as 140 East 28th Street, Apartment 5-G, New 6 York, New York 10016, was examined and testified as 7 follows: 8 EXAMINATION BY MR. ZAKARIN: 9 Q Good afternoon, Mr. Kohn. 10 A Good afternoon. 11 Q You've stated your name for 12 the record, so we'll dispense with 13 that. 14 Please give me your 15 educational background. 16 A I have a law degree from 17 Loyola Law School. 18 COURT REPORTER: I'm sorry. 19 If you could just keep your voice 20 up. Law degree from? 21 A Excuse me. 22 Q Loyola Law School -- 23 A Loyola Law School in Los 24 Angeles. I got a JD degree that I got 25 in 1981. If you want prior to that, I</p>
<p style="text-align: right;">Page 3</p> <p>1 2 IT IS HEREBY STIPULATED AND AGREED, by and 3 among counsel for the respective parties hereto, 4 that the filing, sealing and certification of the 5 within deposition shall be and the same are hereby 6 waived. 7 IT IS FURTHER STIPULATED AND AGREED that all 8 objections, except to the form of the question, 9 shall be reserved to the time of trial; 10 IT IS FURTHER STIPULATED AND AGREED that the 11 within deposition may be signed before any Notary 12 Public with the same force and effect as if signed 13 and sworn to before the court. 14 * * * * 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 5</p> <p>1 KOHN 2 was at Cal State Northridge. I 3 graduated with a business degree. I 4 majored in finance, minored in 5 economics. 6 After law school, I took some 7 professional courses on the 8 entertainment business at USC here and 9 there. I have a LLM at Columbia Law 10 School, which I got in 2016. That 11 was -- I graduated with a Kent 12 Scholar -- James Kent Scholar. 13 Q In what area? 14 A Nothing practical. 15 Jurisprudence, biblical jurisprudence, 16 philosophy of law, free speech, 17 theories of property. 18 Q So just a general LLM? 19 A Very general. 20 Q Okay. 21 A Yeah. 22 Q Give me your employment 23 history, please. 24 A Sure. 25 Q After you graduated law</p>

<p style="text-align: right;">Page 18</p> <p>1 KOHN</p> <p>2 you were retained as an expert for</p> <p>3 purposes of testimony?</p> <p>4 A No.</p> <p>5 Q So you were retained --</p> <p>6 A I was an expert from day one.</p> <p>7 Q Okay.</p> <p>8 Because I wanted to</p> <p>9 differentiate if they're</p> <p>10 differentiating in terms of your fees.</p> <p>11 A No.</p> <p>12 Q So can you tell me how much</p> <p>13 you have charged thus far to the</p> <p>14 plaintiffs for your services?</p> <p>15 A Well, I charge at 650 an</p> <p>16 hour; and I have bills that I think</p> <p>17 exceeded 100 hours. I believe it's</p> <p>18 105, 110. I don't remember.</p> <p>19 Q Through what period of time?</p> <p>20 A Starting -- the date of the</p> <p>21 retainer agreement was February 1st. I</p> <p>22 think that was about when it started.</p> <p>23 Q Okay. So --</p> <p>24 A From this year.</p> <p>25 Q Since February 1st you have</p>	<p style="text-align: right;">Page 20</p> <p>1 KOHN</p> <p>2 companies, whether it's Warner Chapel,</p> <p>3 Sony ATV, ABMG.</p> <p>4 A Not in --</p> <p>5 Q Just to distinguish them from</p> <p>6 a production music library.</p> <p>7 A If you're asking in</p> <p>8 connection with this case?</p> <p>9 Q In connection with this case.</p> <p>10 A No.</p> <p>11 Q And I'm actually asking in</p> <p>12 connection with the generation of your</p> <p>13 report.</p> <p>14 A No.</p> <p>15 Q Have you ever been employed</p> <p>16 by a production music library company?</p> <p>17 A I wouldn't call it employed.</p> <p>18 My uncle ran one of the largest</p> <p>19 production music libraries in the world</p> <p>20 of its time, which was Southern Music</p> <p>21 Library which was owned by Peer Music.</p> <p>22 COURT REPORTER: I'm sorry?</p> <p>23 Owned by?</p> <p>24 A Peer Music, P-e-e-r. Peer</p> <p>25 Music.</p>
<p style="text-align: right;">Page 19</p> <p>1 KOHN</p> <p>2 devoted something slightly north of 100</p> <p>3 hours to your work on this case?</p> <p>4 A Yes.</p> <p>5 Q Okay. That's including</p> <p>6 attending depositions and whatever</p> <p>7 else?</p> <p>8 A Yes.</p> <p>9 Q Okay.</p> <p>10 In connection with the</p> <p>11 preparation of your report, did you</p> <p>12 communicate at all verbally or in</p> <p>13 writing with any production music</p> <p>14 library companies?</p> <p>15 A No.</p> <p>16 Q Have you communicated at all</p> <p>17 verbally or in writing with any</p> <p>18 executives of any production music</p> <p>19 library companies?</p> <p>20 A No.</p> <p>21 Q Have you communicated at all</p> <p>22 verbally or in writing with any music</p> <p>23 publishing companies? And when I say</p> <p>24 music publishing companies, I'm</p> <p>25 referring to popular music publishing</p>	<p style="text-align: right;">Page 21</p> <p>1 KOHN</p> <p>2 Q Did you work for him?</p> <p>3 A Well, I provided him with</p> <p>4 advice. I never charged him.</p> <p>5 Q When did you provide him with</p> <p>6 advice?</p> <p>7 A This would have been back in</p> <p>8 the 1980s.</p> <p>9 Q Do you remember the subject</p> <p>10 matter in which you provided him</p> <p>11 advice?</p> <p>12 A Yeah. My best memory is that</p> <p>13 he invited me to his office, and</p> <p>14 because it was during the time in which</p> <p>15 I was writing the first edition of Kohn</p> <p>16 on Music Licensing. I think it was the</p> <p>17 1980s. It could have been the early</p> <p>18 '90s, but I'm pretty sure it was before</p> <p>19 the first edition. As a matter of fact</p> <p>20 I do -- it had to have been in the</p> <p>21 '80s. I was living in Los Angeles. So</p> <p>22 probably prior to '87.</p> <p>23 I had visited his office,</p> <p>24 which was a little one-man office in</p> <p>25 Taluka Lake, California, which is near</p>

6 (Pages 18 - 21)

<p style="text-align: right;">Page 22</p> <p>1 KOHN</p> <p>2 Burbank, I think. And I spent all</p> <p>3 morning with him. He took phone calls.</p> <p>4 He was talking to people giving</p> <p>5 licenses. I recall actually something</p> <p>6 pretty funny, at least he thought it</p> <p>7 was funny to me because he had got a</p> <p>8 call from -- that day from a company</p> <p>9 that wanted to use a needle drop in</p> <p>10 a --</p> <p>11 COURT REPORTER: I'm sorry,</p> <p>12 sir. Can you just look this way?</p> <p>13 A A needle drop -- yeah. A</p> <p>14 needle drop in a porno film and they</p> <p>15 came up with a song called Big Hammer.</p> <p>16 And he thought that was funny. And he</p> <p>17 takes the -- he had record albums at</p> <p>18 the time and then he would take a DAT</p> <p>19 tape, D-A-T, digital audiotape and do</p> <p>20 recordings. Stick it in an envelope</p> <p>21 and put a contract with it or license</p> <p>22 with it and send it off to the guy who</p> <p>23 took the phone call.</p> <p>24 And what I -- what I did for</p> <p>25 him because I looked at the license</p>	<p style="text-align: right;">Page 24</p> <p>1 KOHN</p> <p>2 Q Okay.</p> <p>3 So you were not employed by</p> <p>4 Music Production -- a production music</p> <p>5 library company but you did this little</p> <p>6 consulting project on a sync license,</p> <p>7 as it were, for your uncle back in the</p> <p>8 '80s?</p> <p>9 A Well, I would say, yeah. I</p> <p>10 mean, whatever questions he had for me</p> <p>11 and other things that I might have over</p> <p>12 the years that I don't really remember</p> <p>13 frankly.</p> <p>14 Q Have you ever engaged in</p> <p>15 licensing on behalf of a production</p> <p>16 music library company?</p> <p>17 A Not of a production music --</p> <p>18 you said engaged in licensing?</p> <p>19 Q Yeah.</p> <p>20 A Actually issuing a license?</p> <p>21 No.</p> <p>22 Q Have you ever been in</p> <p>23 engaged --</p> <p>24 A Not for a production music</p> <p>25 library.</p>
<p style="text-align: right;">Page 23</p> <p>1 KOHN</p> <p>2 that he did, and by that time I had</p> <p>3 been out of Rudin's office and I had</p> <p>4 some experience in synchronization</p> <p>5 licenses and such, and I was kind of</p> <p>6 surprised how simple that form was.</p> <p>7 And it could be better. And I could</p> <p>8 make it better. And I actually put</p> <p>9 together a synchronization license for</p> <p>10 him, which he thought was too long, and</p> <p>11 I got it down to one page and gave that</p> <p>12 to him and he went ahead and started</p> <p>13 using that. And, you know, I'd always</p> <p>14 see him at family events and things</p> <p>15 like that.</p> <p>16 And over the years we talked</p> <p>17 about what he was doing, et cetera, and</p> <p>18 he was using my license for quite a</p> <p>19 while. So I had that. It was a</p> <p>20 one-man shop at that time, but he</p> <p>21 certainly had a lot of experience in</p> <p>22 dealing with a major production music</p> <p>23 library. And I got a sort of -- got an</p> <p>24 idea of what that was through that</p> <p>25 experience.</p>	<p style="text-align: right;">Page 25</p> <p>1 KOHN</p> <p>2 Q Have you ever been involved</p> <p>3 in licensing on behalf of a</p> <p>4 broadcaster?</p> <p>5 MR. MARDEROSIAN: Object to</p> <p>6 the term "involved."</p> <p>7 Vague, ambiguous.</p> <p>8 A I have never -- I don't</p> <p>9 recall ever working for a broadcaster</p> <p>10 in getting synchronization licenses. I</p> <p>11 did on behalf of a production</p> <p>12 company -- while at Rudin's office we</p> <p>13 represented Warner Brother's Pictures.</p> <p>14 We represented 20th Century Fox. We</p> <p>15 represented Irving Azoff, Front Line</p> <p>16 Management. We represented Scotti</p> <p>17 Brothers.</p> <p>18 There was a period of time at</p> <p>19 Warners Brothers Music when we were</p> <p>20 redoing -- this was probably 1982, '83</p> <p>21 or so -- redoing all of Warner Brothers</p> <p>22 Music's synchronization licenses. It</p> <p>23 was a project that I was heavily</p> <p>24 involved with. I spent most of my time</p> <p>25 on it for several weeks. It was a time</p>

7 (Pages 22 - 25)

<p style="text-align: right;">Page 30</p> <p>1 KOHN</p> <p>2 picture, I was directly involved with</p> <p>3 the amount of money that was involved,</p> <p>4 you know, in that. It was a -- you</p> <p>5 come to a point where some fee is</p> <p>6 established and everyone answers for --</p> <p>7 no, most favored nations. So it</p> <p>8 becomes easy at a point.</p> <p>9 There's only so many of these</p> <p>10 things you have to do in order to</p> <p>11 become knowledgeable on how these</p> <p>12 things are done. I don't need to do</p> <p>13 10,000 synchronization licenses in</p> <p>14 order to learn how these things are</p> <p>15 negotiated.</p> <p>16 Q Have you ever worked for a</p> <p>17 PRO in dealing with cue sheets and</p> <p>18 broadcasters?</p> <p>19 A I never worked for a PRO, no.</p> <p>20 Q Now in your report you state</p> <p>21 that acquiring a work on a</p> <p>22 work-for-hire basis does not mean that</p> <p>23 there are no other obligations owed to</p> <p>24 the writer.</p> <p>25 Now, you know that a work for</p>	<p style="text-align: right;">Page 32</p> <p>1 KOHN</p> <p>2 to object.</p> <p>3 It calls for a legal opinion</p> <p>4 and conclusion.</p> <p>5 Q You can answer the question.</p> <p>6 A There are royalty obligations</p> <p>7 that are specified in the contract, and</p> <p>8 there are implied obligations that are</p> <p>9 a part of every contract.</p> <p>10 Q We'll get to the implied</p> <p>11 obligations in due course. Right now</p> <p>12 the question that I asked you was: On</p> <p>13 a work for hire, the copyright owner is</p> <p>14 the acquirer of the rights and that</p> <p>15 acquirer is also under the law of the</p> <p>16 author; isn't that correct?</p> <p>17 MR. MARDEROSIAN: I'm going</p> <p>18 to object.</p> <p>19 Calls for -- excuse me, Bob.</p> <p>20 You need to protect the record.</p> <p>21 I'm going to object as</p> <p>22 calling for a legal opinion and</p> <p>23 conclusion, and it is an</p> <p>24 incomplete hypothetical.</p> <p>25 Therefore, it's vague and</p>
<p style="text-align: right;">Page 31</p> <p>1 KOHN</p> <p>2 hire makes the publisher of the work</p> <p>3 not only the copyright owner but also</p> <p>4 the author; isn't that correct?</p> <p>5 MR. MARDEROSIAN: I'm just</p> <p>6 going to object.</p> <p>7 It calls for a legal opinion</p> <p>8 and conclusion.</p> <p>9 It's vague and overbroad.</p> <p>10 Q You can answer the question.</p> <p>11 A When a record company</p> <p>12 acquires a master from a recording</p> <p>13 artist, it's under a work for hire</p> <p>14 agreement. So -- but under that</p> <p>15 agreement there are royalty obligations</p> <p>16 back to the recording artist. Just</p> <p>17 because they have a work for hire and</p> <p>18 they're the author or considered the</p> <p>19 author of the work, that is the record</p> <p>20 company, doesn't mean they have no</p> <p>21 financial obligation whatsoever to the</p> <p>22 person they're contracting with.</p> <p>23 Q Those royalty obligations are</p> <p>24 specified in the contract, correct?</p> <p>25 MR. MARDEROSIAN: I'm going</p>	<p style="text-align: right;">Page 33</p> <p>1 KOHN</p> <p>2 overbroad.</p> <p>3 A Please read the question</p> <p>4 back.</p> <p>5 Q I can say -- I'll say it</p> <p>6 again, and the objection will be deemed</p> <p>7 to this so we don't have to waste time.</p> <p>8 The acquirer of a work for</p> <p>9 hire under the Copyright Act is not</p> <p>10 merely the owner of the copyright but</p> <p>11 it is also deemed the author of the</p> <p>12 work; isn't that correct?</p> <p>13 A That's a different question</p> <p>14 but I believe the answer to it is yes.</p> <p>15 Q Okay.</p> <p>16 And absent an agreement to</p> <p>17 the contrary the author of the work</p> <p>18 would be entitled to the author share</p> <p>19 of income; isn't that correct?</p> <p>20 MR. MARDEROSIAN: I'm just</p> <p>21 going to object.</p> <p>22 It calls for a legal opinion</p> <p>23 and conclusion. And it is an</p> <p>24 incomplete hypothetical.</p> <p>25</p>

<p style="text-align: right;">Page 54</p> <p>1 KOHN</p> <p>2 said, virtually give away the</p> <p>3 intellectual property in exchange for a</p> <p>4 small upfront fee and potential</p> <p>5 lucrative writer's share of public</p> <p>6 performance royalties.</p> <p>7 The month before this</p> <p>8 agreement was signed they got \$10,000</p> <p>9 from the same company that they signed</p> <p>10 this agreement with for a sync license</p> <p>11 for just -- they kept the intellectual</p> <p>12 property. So they went from \$10,000 on</p> <p>13 a non-work for hire license down to</p> <p>14 \$200 for a work for hire. So that's</p> <p>15 where the word "small" comes from.</p> <p>16 Q I wasn't asking you about the</p> <p>17 word "small."</p> <p>18 A Well, I wanted to clarify my</p> <p>19 answer. You asked me -- you read the</p> <p>20 whole thing to me.</p> <p>21 Q You have to wait -- when I'm</p> <p>22 talking, you wait. When you're</p> <p>23 talking, I'll wait. It will be much</p> <p>24 better that way. Okay?</p> <p>25 A Are you finished?</p>	<p style="text-align: right;">Page 56</p> <p>1 KOHN</p> <p>2 that's what the reports indicate.</p> <p>3 Q That wasn't my question. I</p> <p>4 asked a different question.</p> <p>5 I said --</p> <p>6 A Yes.</p> <p>7 Q -- are those licenses</p> <p>8 listed --</p> <p>9 A Yeah.</p> <p>10 Q -- in the material --</p> <p>11 A They don't have to be</p> <p>12 listed --</p> <p>13 COURT REPORTER: I'm sorry,</p> <p>14 sir. I just need a full question.</p> <p>15 A They don't have to be listed.</p> <p>16 I talked about Aron and Robert</p> <p>17 regularly command \$60,000 for film</p> <p>18 trailers --</p> <p>19 COURT REPORTER: Sir.</p> <p>20 MR. MARDEROSIAN: Slow down.</p> <p>21 Slow down, please.</p> <p>22 A Aron and Robert regularly</p> <p>23 command \$60,000 for film trailers that</p> <p>24 use works they own and control.</p> <p>25 Q I understand --</p>
<p style="text-align: right;">Page 55</p> <p>1 KOHN</p> <p>2 Q No, because now I'm going to</p> <p>3 ask you the question --</p> <p>4 A Good.</p> <p>5 Q -- that you didn't answer.</p> <p>6 You said that we were</p> <p>7 provided all of these licenses. And</p> <p>8 I'm asking you what licenses do you of</p> <p>9 your own knowledge know we were</p> <p>10 provided of the brothers?</p> <p>11 A There's a set of licenses,</p> <p>12 about 15 licenses or -- 15 to 20</p> <p>13 licenses that I've seen in which the</p> <p>14 brothers have licensed to third parties</p> <p>15 of their own music that's not -- songs</p> <p>16 and recordings that are not included in</p> <p>17 either of the contracts in this case,</p> <p>18 in which they licensed over the period</p> <p>19 of time from 2010 until about 2017.</p> <p>20 Q Are those licenses identified</p> <p>21 in the works that you reviewed, the</p> <p>22 materials you reviewed?</p> <p>23 MR. MARDEROSIAN: He's been</p> <p>24 provided with all of the materials</p> <p>25 that were produced. I think</p>	<p style="text-align: right;">Page 57</p> <p>1 KOHN</p> <p>2 A Where do you think I got that</p> <p>3 information?</p> <p>4 Q I'm asking you a different</p> <p>5 question.</p> <p>6 A Well, it's in my report.</p> <p>7 Q So you were provided with</p> <p>8 licenses. That's where you get the</p> <p>9 information from; is that right?</p> <p>10 A Yes.</p> <p>11 Q Okay.</p> <p>12 You also said that we were</p> <p>13 provided those licenses. And I'm</p> <p>14 asking you how do you know that?</p> <p>15 A I just made an assumption on</p> <p>16 that.</p> <p>17 Q So it was an assumption that</p> <p>18 you made while you were sitting here?</p> <p>19 A Yes.</p> <p>20 Q You don't know that as a</p> <p>21 fact?</p> <p>22 A I don't get involved with</p> <p>23 communications between the plaintiff's</p> <p>24 attorneys and you.</p> <p>25 So I have no personal</p>

15 (Pages 54 - 57)

<p style="text-align: right;">Page 58</p> <p>1 KOHN</p> <p>2 knowledge of what they sent you and</p> <p>3 what you sent them.</p> <p>4 Q I understand. All I'm trying</p> <p>5 to do is get a clear record as to when</p> <p>6 you know something and when you are</p> <p>7 assuming something.</p> <p>8 A Well, it's fair enough.</p> <p>9 Q Because there's a difference.</p> <p>10 A It's fair enough.</p> <p>11 Q That's all.</p> <p>12 How many production music</p> <p>13 library work for hire contracts have</p> <p>14 you studied in your career? I know</p> <p>15 these -- these two we know you have.</p> <p>16 But beyond those?</p> <p>17 A I don't remember.</p> <p>18 Q More than 100? More than a</p> <p>19 1,000?</p> <p>20 A I didn't do a lot of</p> <p>21 dealing --</p> <p>22 Q More than two?</p> <p>23 A It might have been more than</p> <p>24 two; but it's probably less than 1,000.</p> <p>25 I mean, it's less than 100.</p>	<p style="text-align: right;">Page 60</p> <p>1 KOHN</p> <p>2 A Production music library</p> <p>3 contracts, yes --</p> <p>4 COURT REPORTER: Sir. I'm</p> <p>5 sorry. Wait. I just need a full</p> <p>6 question.</p> <p>7 MR. ZAKARIN: You're right.</p> <p>8 We'll try to slow it down.</p> <p>9 Q The production music library</p> <p>10 contract?</p> <p>11 MR. MARDEROSIAN: Excuse me.</p> <p>12 It really -- this needs to slow</p> <p>13 down.</p> <p>14 In all due respect to you,</p> <p>15 Don, you need to slow it down with</p> <p>16 the questions. And, Bob, in</p> <p>17 responding to the questions, we</p> <p>18 need a moment, take a breath so</p> <p>19 that we don't wear the court</p> <p>20 reporter out so we can get through</p> <p>21 the deposition today.</p> <p>22 Okay. And I am as guilty as</p> <p>23 anyone in what advice I just gave</p> <p>24 the both of you. So let's get</p> <p>25 that skunk out on the table right</p>
<p style="text-align: right;">Page 59</p> <p>1 KOHN</p> <p>2 Q Less than ten?</p> <p>3 A I haven't done a lot of</p> <p>4 production music library work directly.</p> <p>5 I've never worked for a production</p> <p>6 music library.</p> <p>7 Q I understand.</p> <p>8 A But I've seen production</p> <p>9 music library licenses over time in</p> <p>10 connection with studying and getting</p> <p>11 information from either my father or</p> <p>12 for other people in the industry or</p> <p>13 from sitting on panels with people like</p> <p>14 Mr. Massarsky, who's sitting here at</p> <p>15 the table. I might have been on a</p> <p>16 panel with him at one point or another</p> <p>17 where you pick up what the customs and</p> <p>18 practices are in the music industry.</p> <p>19 Q So you glean that from your</p> <p>20 discussions with people like Massarsky</p> <p>21 or --</p> <p>22 A Or from looking directly at</p> <p>23 the contracts.</p> <p>24 Q The production music library</p> <p>25 contracts --</p>	<p style="text-align: right;">Page 61</p> <p>1 KOHN</p> <p>2 now.</p> <p>3 But I'm just trying to help</p> <p>4 the process so that Mr. Zakarin,</p> <p>5 on behalf of his clients, can get</p> <p>6 your opinions and question the</p> <p>7 opinions that you set forth in</p> <p>8 your report.</p> <p>9 THE WITNESS: Thanks, Mick.</p> <p>10 MR. MARDEROSIAN: All right.</p> <p>11 Q Okay.</p> <p>12 Where were we? Did we have</p> <p>13 an answer? Let's try to get back to</p> <p>14 where we were. Give me a second.</p> <p>15 Now, you gleaned this -- the</p> <p>16 knowledge of the custom and practice</p> <p>17 from being on panels with people like</p> <p>18 Massarsky and from the production music</p> <p>19 library contracts, the work for hire</p> <p>20 contracts you've looked at?</p> <p>21 A And discussions that I've had</p> <p>22 with my Uncle Roy and the advice that I</p> <p>23 might have given him over a period of</p> <p>24 years, that he might have asked me</p> <p>25 questions that I have given him. He</p>

<p style="text-align: right;">Page 62</p> <p>1 KOHN</p> <p>2 was the closest person in my life whose</p> <p>3 full-time business for 40 years was</p> <p>4 running a production music library. He</p> <p>5 was my uncle, and I would see him</p> <p>6 very -- almost every weekend, you know,</p> <p>7 in California.</p> <p>8 Q Is he still alive?</p> <p>9 A No. He passed away last</p> <p>10 year -- or two years ago.</p> <p>11 Q I'm sorry.</p> <p>12 A He was 91, lived a good life.</p> <p>13 Q But as you testified already,</p> <p>14 in connection with your forming of your</p> <p>15 report, you did not consult with, talk</p> <p>16 to any production music libraries or</p> <p>17 executives at those companies?</p> <p>18 A No.</p> <p>19 Q Okay.</p> <p>20 Now, you've talked about</p> <p>21 having looked at some, I think, 15</p> <p>22 licenses, I think you said, of the --</p> <p>23 of the plaintiff's work -- of their</p> <p>24 self-published works, I guess it is; is</p> <p>25 that right?</p>	<p style="text-align: right;">Page 64</p> <p>1 KOHN</p> <p>2 public performance income; is that</p> <p>3 right?</p> <p>4 A Yes.</p> <p>5 Q And that would be hopefully</p> <p>6 generated by successful placements of</p> <p>7 their works?</p> <p>8 A Yes.</p> <p>9 Q Placements with whom?</p> <p>10 A Placements with anyone</p> <p>11 producing audiovisual works that are</p> <p>12 likely to be broadcast by organizations</p> <p>13 that are licensed by one of the</p> <p>14 productions -- one of the PROs or</p> <p>15 particularly in this case BMI.</p> <p>16 Q Well, in this case we're</p> <p>17 dealing with the 2010 agreement. Why</p> <p>18 don't we just put that out there now</p> <p>19 just so we have it. Okay? We're not</p> <p>20 going to directly refer to it right</p> <p>21 this minute, but you might as well mark</p> <p>22 it as K Exhibit 2 or K2.</p> <p>23 (Blanket Composer Agreement</p> <p>24 (Direct) dated as of May 19, 2010,</p> <p>25 was marked K Exhibit 2, for</p>
<p style="text-align: right;">Page 63</p> <p>1 KOHN</p> <p>2 A Yes.</p> <p>3 Q Have you examined any of</p> <p>4 their other production music library</p> <p>5 agreements other than the two in this</p> <p>6 case?</p> <p>7 A I don't know whether they</p> <p>8 have other production music library</p> <p>9 contracts.</p> <p>10 Q You're not aware of that?</p> <p>11 A No.</p> <p>12 Q Okay.</p> <p>13 A One way or the other, I don't</p> <p>14 know whether they have or have not. I</p> <p>15 certainly haven't looked at that.</p> <p>16 Q You haven't looked at them?</p> <p>17 A No.</p> <p>18 Q If they exist?</p> <p>19 A Well, if they exist, I</p> <p>20 haven't looked at them.</p> <p>21 Q Okay. Fair enough.</p> <p>22 Now, in your report what we</p> <p>23 just looked at is what they were -- an</p> <p>24 important consideration was the</p> <p>25 potential lucrative writer share of</p>	<p style="text-align: right;">Page 65</p> <p>1 KOHN</p> <p>2 identification, as of this date.)</p> <p>3 Q You can just put that next to</p> <p>4 it. I'm not going to be questioning</p> <p>5 you about it.</p> <p>6 A Okay.</p> <p>7 Q But I'll ask you one</p> <p>8 question. Can you identify that as the</p> <p>9 2010 agreement that you reviewed?</p> <p>10 A Yes.</p> <p>11 MR. MARDEROSIAN: Don, is</p> <p>12 this the one that's not</p> <p>13 Bates-stamped? Is this the one</p> <p>14 that you folks produced pursuant</p> <p>15 to Judge Crotty's order or is this</p> <p>16 one that's been produced in</p> <p>17 discovery or, excuse me, or is</p> <p>18 this the one that the plaintiff's</p> <p>19 produced.</p> <p>20 MR. BAGLEY: I believe that</p> <p>21 this is the copy that you sent to</p> <p>22 the court after he asked for a</p> <p>23 more legible copy of the</p> <p>24 agreements.</p> <p>25 MR. MARDEROSIAN: Yes.</p>

<p style="text-align: right;">Page 146</p> <p>1 KOHN</p> <p>2 not sure there's room. So let's just</p> <p>3 mark this --</p> <p>4 MR. MARDEROSIAN: And that's</p> <p>5 demeaning. You need to stop that.</p> <p>6 MR. ZAKARIN: Stop what?</p> <p>7 MR. MARDEROSIAN: Do you have</p> <p>8 a hearing problem as well?</p> <p>9 MR. ZAKARIN: I don't hear</p> <p>10 you anymore.</p> <p>11 MR. MARDEROSIAN: You need to</p> <p>12 stop trying to demean witnesses</p> <p>13 and people.</p> <p>14 MR. ZAKARIN: I don't hear</p> <p>15 you anymore.</p> <p>16 MR. MARDEROSIAN: Don't do</p> <p>17 that --</p> <p>18 MR. ZAKARIN: Let's mark</p> <p>19 this Exhibit 3 --</p> <p>20 MR. MARDEROSIAN: -- or we're</p> <p>21 going to leave. I'm going to</p> <p>22 leave.</p> <p>23 MR. ZAKARIN: Go. You can</p> <p>24 leave.</p> <p>25 MR. MARDEROSIAN: Yeah, I'm</p>	<p style="text-align: right;">Page 148</p> <p>1 KOHN</p> <p>2 Mix Viacom to register the works with</p> <p>3 societies, correct?</p> <p>4 A Yes.</p> <p>5 Q And turn to your report, if</p> <p>6 you would. We're also still on Page 8.</p> <p>7 Not a major point, but it's the third</p> <p>8 bullet point from the bottom.</p> <p>9 MR. MARDEROSIAN: Page 8?</p> <p>10 MR. ZAKARIN: On Page 8.</p> <p>11 A On page 8 of my report?</p> <p>12 Q Yes. Third bullet point from</p> <p>13 the bottom.</p> <p>14 Do you see it?</p> <p>15 A Yes.</p> <p>16 Q And you say -- you have in</p> <p>17 italics that the registration is</p> <p>18 required to be, in italics, on a timely</p> <p>19 basis.</p> <p>20 Do you see that?</p> <p>21 A Yes.</p> <p>22 Q That language, you would</p> <p>23 agree, is not specifically in the</p> <p>24 contract?</p> <p>25 A I would say that it is</p>
<p style="text-align: right;">Page 147</p> <p>1 KOHN</p> <p>2 going to leave with the witness.</p> <p>3 MR. ZAKARIN: That's up to</p> <p>4 him. Let's mark this Exhibit 3,</p> <p>5 K3.</p> <p>6 MR. MARDEROSIAN: Let's take</p> <p>7 a break. We're going to take a</p> <p>8 break.</p> <p>9 (Whereupon, a brief recess</p> <p>10 was taken.)</p> <p>11 (March 7, 2011 Agreement, was</p> <p>12 marked K Exhibit 3, for</p> <p>13 identification, as of this date.)</p> <p>14 Q I'll ask you first, can you</p> <p>15 identify K3 as the 2011 agreement that</p> <p>16 you reviewed?</p> <p>17 A Yes.</p> <p>18 Q And I've asked you to turn to</p> <p>19 Paragraph 4.8.</p> <p>20 A Yes.</p> <p>21 Q And you have that in front of</p> <p>22 you?</p> <p>23 A Yes, I do.</p> <p>24 Q Okay. And that's the</p> <p>25 paragraph that required New Creative</p>	<p style="text-align: right;">Page 149</p> <p>1 KOHN</p> <p>2 specifically in the contract because if</p> <p>3 it's not done in a timely basis the</p> <p>4 performance royalties are not going to</p> <p>5 get paid from the performance rights</p> <p>6 societies, according to the performance</p> <p>7 rights societies, particularly ASCAP</p> <p>8 but BMI too.</p> <p>9 Q Is it your understanding that</p> <p>10 performance royalties are based upon</p> <p>11 the filing of a works registration?</p> <p>12 A It could be a works</p> <p>13 registration or a cue sheet</p> <p>14 registration.</p> <p>15 Q Do you know -- if no cue</p> <p>16 sheets are filed but a works</p> <p>17 registration is filed, would</p> <p>18 performance royalties be paid?</p> <p>19 MR. MARDEROSIAN: Objection.</p> <p>20 Vague and overbroad.</p> <p>21 Incomplete hypothetical.</p> <p>22 Q You can answer.</p> <p>23 A According to the societies,</p> <p>24 it's likely that they're not going to</p> <p>25 be paid if there's no cue sheet</p>

<p style="text-align: right;">Page 150</p> <p>1 KOHN</p> <p>2 registrations on file.</p> <p>3 There's one thing I want to</p> <p>4 talk about in terms of --</p> <p>5 Q Mr. Kohn, if you would, I</p> <p>6 don't want to interrupt you but --</p> <p>7 A Go ahead.</p> <p>8 Q -- the way this goes is Qs</p> <p>9 and As. And it -- it doesn't go very</p> <p>10 well otherwise --</p> <p>11 A Right.</p> <p>12 Q -- and I want -- I don't want</p> <p>13 you to stay here until 2:00, 3:00 in</p> <p>14 the morning or whatever we have to go</p> <p>15 to. I'd rather try to get my questions</p> <p>16 out, try to get your answers in so that</p> <p>17 we can finish. That's my goal.</p> <p>18 MR. MARDEROSIAN: This may</p> <p>19 just -- this may just be a further</p> <p>20 part of the answer he was giving.</p> <p>21 I don't know. Nobody asked, and</p> <p>22 you interrupted him.</p> <p>23 A Well, I wanted to clarify</p> <p>24 another answer that in connection with</p> <p>25 now thinking about this I was looking</p>	<p style="text-align: right;">Page 152</p> <p>1 KOHN</p> <p>2 And there were two</p> <p>3 depositions that I recall reading in</p> <p>4 which the Viacom representatives, I</p> <p>5 believe, admitted -- I'm not sure who</p> <p>6 it is. Is it -- now I'm thinking about</p> <p>7 it, Ernesto and Quello, where they</p> <p>8 told -- or they admitted to telling the</p> <p>9 boys or suggested that -- to the boys</p> <p>10 that the -- there is no online system</p> <p>11 for the boys to enter into cue sheet</p> <p>12 information. So don't worry. We'll</p> <p>13 take care of it.</p> <p>14 And obviously the 2011</p> <p>15 agreement, I guess, memorializes what</p> <p>16 the understanding was in the 2010</p> <p>17 agreement with respect to the -- the</p> <p>18 company's obligation under a specific</p> <p>19 expressed obligation under 4.8 to</p> <p>20 register the work.</p> <p>21 COURT REPORTER: I'm sorry?</p> <p>22 4.8?</p> <p>23 A 4.8.</p> <p>24 Q Let me see if I understand</p> <p>25 what you just said.</p>
<p style="text-align: right;">Page 151</p> <p>1 KOHN</p> <p>2 for the equivalent paragraph concerning</p> <p>3 registration in the 2010 agreement.</p> <p>4 Q Yes.</p> <p>5 A And that refreshed my</p> <p>6 recollection that there is a provision</p> <p>7 in the 2010 agreement --</p> <p>8 Q Can you tell me what it is?</p> <p>9 A Yeah. In the delivery</p> <p>10 provision on -- there's no page numbers</p> <p>11 here. But --</p> <p>12 Q Is there a paragraph</p> <p>13 reference?</p> <p>14 A Paragraph 5.</p> <p>15 Q Okay.</p> <p>16 A Where it talks about how the</p> <p>17 Aron -- Aron and Rob's company were to</p> <p>18 enter -- provide services of entering</p> <p>19 cue sheet information directly into</p> <p>20 company's proprietary --</p> <p>21 COURT REPORTER: I'm sorry?</p> <p>22 Entering cue sheet information?</p> <p>23 A -- entering cue sheet</p> <p>24 information directly into company's</p> <p>25 proprietary online cue sheet system.</p>	<p style="text-align: right;">Page 153</p> <p>1 KOHN</p> <p>2 A Yeah.</p> <p>3 Q That -- you're pointing me to</p> <p>4 Paragraph 5 where the Marderosians, the</p> <p>5 plaintiffs, were required to enter</p> <p>6 information for the preparation of cue</p> <p>7 sheets; is that correct?</p> <p>8 A Into --</p> <p>9 MR. MARDEROSIAN: Objection.</p> <p>10 Misstatement of the testimony.</p> <p>11 A They would provide services</p> <p>12 required in connection with the</p> <p>13 preparation of cue sheets. It doesn't</p> <p>14 talk about filing them.</p> <p>15 Q I understand that that part</p> <p>16 of it.</p> <p>17 A But in connection with the</p> <p>18 preparation of them. Okay? And then</p> <p>19 it says which who include entering the</p> <p>20 information directly into their</p> <p>21 proprietary online cue sheet system,</p> <p>22 which I understand from the testimony,</p> <p>23 never existed.</p> <p>24 Q You understand from whose</p> <p>25 testimony?</p>

<p style="text-align: right;">Page 154</p> <p>1 KOHN</p> <p>2 A I'm trying to think back to</p> <p>3 the names. I think it's Quello and</p> <p>4 Ernesto -- no, Jose -- I'm thinking of</p> <p>5 something else. Cuervo.</p> <p>6 Okay. It's just a vague</p> <p>7 recollection that I have.</p> <p>8 Q You have a vague recollection</p> <p>9 that there's deposition testimony to</p> <p>10 the effect that there was no such</p> <p>11 online system, so that it got dealt</p> <p>12 with in the 2011 agreement through the</p> <p>13 specific registration requirement?</p> <p>14 A Yes.</p> <p>15 Q If I understand the thrust of</p> <p>16 what you're saying then, and please</p> <p>17 correct me if I'm wrong, it's that, in</p> <p>18 fact, there was no specific</p> <p>19 registration provision in the 2010</p> <p>20 agreement, there was this cue sheet</p> <p>21 preparation provision --</p> <p>22 A Right.</p> <p>23 Q -- and then it got corrected</p> <p>24 or addressed in the 2011 agreement in</p> <p>25 Paragraph 4.8 that we just read?</p>	<p style="text-align: right;">Page 156</p> <p>1 KOHN</p> <p>2 It is an incomplete</p> <p>3 hypothetical. It's vague and</p> <p>4 overbroad.</p> <p>5 Q You can answer the question.</p> <p>6 A I disagree with the expert</p> <p>7 reports provided by the defendant in</p> <p>8 the case who the experts in which -- in</p> <p>9 which the experts took the position</p> <p>10 that there's no custom and practice in</p> <p>11 the music publishing or music</p> <p>12 production library business of not</p> <p>13 correcting cue sheets.</p> <p>14 I do believe that there is a</p> <p>15 custom and practice of correcting cue</p> <p>16 sheets, especially when the cue sheet</p> <p>17 missed information, missed corrections</p> <p>18 and manipulated incorrectly through</p> <p>19 metadata, however we want to discuss</p> <p>20 that in terms of before, was caused by</p> <p>21 the music publisher. So I -- if there</p> <p>22 is -- if the composer's name is wrong,</p> <p>23 there's a likelihood that the money is</p> <p>24 going to not be paid or be misdirected</p> <p>25 to someone other than the songwriter.</p>
<p style="text-align: right;">Page 155</p> <p>1 KOHN</p> <p>2 A Right.</p> <p>3 Q Thank you.</p> <p>4 I just wanted to understand</p> <p>5 what you were saying.</p> <p>6 MR. MARDEROSIAN: I think the</p> <p>7 witnesses he was referring to is</p> <p>8 Jose Quello, Q-U-E-L-L-O, and</p> <p>9 Ernesto Elias.</p> <p>10 MR. ZAKARIN: I can't swear</p> <p>11 you, but it doesn't matter. It</p> <p>12 either was testified to, or it</p> <p>13 wasn't. We know who they are.</p> <p>14 It's the Viacom witnesses.</p> <p>15 A Thank you.</p> <p>16 Q Again in Exhibit 3, if you</p> <p>17 would, and other than whether there is</p> <p>18 an implied obligation or not, can you</p> <p>19 tell me any provision in the 2011</p> <p>20 contract which required Viacom to check</p> <p>21 any cue sheets that were filed with</p> <p>22 BMI?</p> <p>23 MR. MARDEROSIAN: I'm just</p> <p>24 going to object. Calls for a</p> <p>25 legal opinion and conclusion.</p>	<p style="text-align: right;">Page 157</p> <p>1 KOHN</p> <p>2 And it's as between the</p> <p>3 songwriter and the publisher. It is</p> <p>4 not the songwriter's responsibility to</p> <p>5 do it. It's the -- to administer these</p> <p>6 properly, the cue sheets, but it's the</p> <p>7 music publisher's responsibility. So</p> <p>8 if a major source of the income of the</p> <p>9 songwriter under the bargain that has</p> <p>10 been entered into under both the 2010</p> <p>11 agreement and the 2011 agreement is for</p> <p>12 them to get their performance royalties</p> <p>13 from BMI, those cue sheets have to be</p> <p>14 entered correctly and they have to have</p> <p>15 their composer's name on it, not</p> <p>16 something like Mix Tape or something</p> <p>17 else.</p> <p>18 So it is the responsibility</p> <p>19 of the publisher to perform those</p> <p>20 administrative duties so that the</p> <p>21 songwriter gets the benefit of the</p> <p>22 bargain.</p> <p>23 Q We're going to deal with the</p> <p>24 custom and practice pretty much right</p> <p>25 now that you just said exists. But</p>

<p style="text-align: right;">Page 158</p> <p>1 KOHN</p> <p>2 that wasn't my question.</p> <p>3 My question was simply, other</p> <p>4 than there, you know, being some</p> <p>5 implied obligation or you say there's</p> <p>6 custom and practice, is there any</p> <p>7 provision in the agreement that</p> <p>8 requires Viacom to check the cue sheets</p> <p>9 for accuracy? That's my question.</p> <p>10 MR. MARDEROSIAN: I'm going</p> <p>11 to object. It's been asked and</p> <p>12 answered.</p> <p>13 It calls for a legal opinion</p> <p>14 and conclusion.</p> <p>15 The document speaks for</p> <p>16 itself, and it is an incomplete</p> <p>17 hypothetical and inconsistent with</p> <p>18 the facts of this case.</p> <p>19 Q You can now answer the</p> <p>20 question.</p> <p>21 A Okay. I am satisfied with my</p> <p>22 previous answer, and the document</p> <p>23 speaks for itself.</p> <p>24 Q Well, I'm not satisfied; but</p> <p>25 you're satisfied. So I will move on.</p>	<p style="text-align: right;">Page 160</p> <p>1 KOHN</p> <p>2 any industry --</p> <p>3 Q Yeah.</p> <p>4 A -- is what is typically done</p> <p>5 in connection with performing one's</p> <p>6 obligations under contracts or</p> <p>7 performing one's obligations to</p> <p>8 maximize the revenues or minimize the</p> <p>9 costs for the business in question.</p> <p>10 Q So custom and practice is</p> <p>11 something that in an industry is</p> <p>12 typically done by most companies in an</p> <p>13 industry; is that right?</p> <p>14 MR. MARDEROSIAN: I'm just</p> <p>15 going to object. It misstates the</p> <p>16 testimony. It's vague and</p> <p>17 ambiguous.</p> <p>18 Q You can answer.</p> <p>19 A I would say that custom and</p> <p>20 practice is performed by companies in</p> <p>21 the industry who conform to their</p> <p>22 obligations to fulfill the terms of the</p> <p>23 contract, the bargains they've made and</p> <p>24 their implied obligations of good faith</p> <p>25 and fair dealing with those they</p>
<p style="text-align: right;">Page 159</p> <p>1 KOHN</p> <p>2 Now, Mr. Kohn, in defining</p> <p>3 custom and practice in an industry, I</p> <p>4 want to understand how you define</p> <p>5 custom and practice. Does it mean that</p> <p>6 a custom and practice is something that</p> <p>7 some company in the industry does</p> <p>8 sometimes, or is it something that all</p> <p>9 companies in the industry invariably do</p> <p>10 as a matter of consistent practice?</p> <p>11 MR. MARDEROSIAN: Object to</p> <p>12 the question as it's vague and</p> <p>13 overbroad.</p> <p>14 It's an incomplete</p> <p>15 hypothetical, and it calls for a</p> <p>16 legal conclusion.</p> <p>17 MR. ZAKARIN: Let me do it</p> <p>18 differently.</p> <p>19 Q Tell me what your definition</p> <p>20 is of custom and practice.</p> <p>21 MR. MARDEROSIAN: In what</p> <p>22 regard to what topic?</p> <p>23 I object. It's vague.</p> <p>24 Q You can answer the question.</p> <p>25 A Well, custom and practice in</p>	<p style="text-align: right;">Page 161</p> <p>1 KOHN</p> <p>2 contract with.</p> <p>3 Q So isn't that a circular</p> <p>4 definition, which is, custom and</p> <p>5 practice is only that which the</p> <p>6 companies do who are properly doing</p> <p>7 something as opposed to everybody else?</p> <p>8 MR. MARDEROSIAN: I'm going</p> <p>9 to object to the question.</p> <p>10 Q Isn't that a circular</p> <p>11 definition?</p> <p>12 MR. MARDEROSIAN: The</p> <p>13 question is argumentative. It's</p> <p>14 vague and overbroad.</p> <p>15 A It's not a circular</p> <p>16 definition. It's a definition to a</p> <p>17 term which you've even tried to</p> <p>18 characterize in such abstract means. I</p> <p>19 think the discussion is better had in</p> <p>20 determining whether some particular</p> <p>21 activity is a custom and practice in</p> <p>22 the industry or not.</p> <p>23 Q So you've given me your</p> <p>24 definition. Your definition is that</p> <p>25 it's a -- custom and practice is</p>

<p style="text-align: right;">Page 170</p> <p>1 KOHN</p> <p>2 now told us. So we can move on.</p> <p>3 MR. MARDEROSIAN: Just for</p> <p>4 the record, I'm going to --</p> <p>5 A And --</p> <p>6 MR. MARDEROSIAN: -- excuse</p> <p>7 me -- I'm going to object. That</p> <p>8 was a misstate of what he said.</p> <p>9 And it's vague and ambiguous.</p> <p>10 A Typically done --</p> <p>11 MR. ZAKARIN: Okay. The</p> <p>12 record will reflect it.</p> <p>13 A You didn't finish what I had</p> <p>14 said. But it's typically done in</p> <p>15 compliance -- I might have said</p> <p>16 earlier, in conformance, but I may have</p> <p>17 misspoke -- but in compliance with</p> <p>18 obligations that you have both express</p> <p>19 obligations and implied obligations</p> <p>20 with respect to those people that you</p> <p>21 are contractually dealing with in the</p> <p>22 industry. Or to perform your duties</p> <p>23 correctly for the sake of the company</p> <p>24 that you're working for or for those</p> <p>25 whom you're working for, such as</p>	<p style="text-align: right;">Page 172</p> <p>1 KOHN</p> <p>2 And then you say going down,</p> <p>3 the last bullet point, it is the custom</p> <p>4 and practice of music publishers to</p> <p>5 review cue sheets for accuracy and</p> <p>6 correct any mistakes. This is true of</p> <p>7 even publishers who consider themselves</p> <p>8 to be music production libraries.</p> <p>9 Those are your statements in</p> <p>10 your report. And when you refer to</p> <p>11 custom and practice there, is that the</p> <p>12 custom and practice as you've just</p> <p>13 previously defined it?</p> <p>14 A I don't understand the</p> <p>15 question. Say that again.</p> <p>16 Q You've said -- you used the</p> <p>17 term "custom and practice." Is that --</p> <p>18 is your use of the term "custom and</p> <p>19 practice" there consistent with the</p> <p>20 definition that you gave me just a few</p> <p>21 minutes ago, or is it anything</p> <p>22 different?</p> <p>23 A I think it is. I think it</p> <p>24 is.</p> <p>25 Q It is consistent?</p>
<p style="text-align: right;">Page 171</p> <p>1 KOHN</p> <p>2 shareholders or employees or</p> <p>3 songwriters and other third parties you</p> <p>4 may be contracting with.</p> <p>5 Q On Page 10 -- turn to Page 10</p> <p>6 of your report if you would. I'm going</p> <p>7 to read you a couple of things that you</p> <p>8 said on the same topic.</p> <p>9 Top of the page you say, it</p> <p>10 has long been the responsibility of the</p> <p>11 songwriter's music publisher to monitor</p> <p>12 the cue sheets, submit it to the DROs</p> <p>13 and with the advent of cable television</p> <p>14 and the platform it has provided to</p> <p>15 independent television producers, the</p> <p>16 responsibility for reviewing cue sheets</p> <p>17 for accuracy has now become a routine</p> <p>18 part of a music publisher's basic</p> <p>19 responsibilities.</p> <p>20 You then go on and say in the</p> <p>21 next bullet point, as between the music</p> <p>22 publisher, the PRO and the songwriter,</p> <p>23 the publisher bears responsibility for</p> <p>24 making sure the cue sheets are filed</p> <p>25 with the proper PRO and are accurate.</p>	<p style="text-align: right;">Page 173</p> <p>1 KOHN</p> <p>2 A It would -- it sounds</p> <p>3 consistent.</p> <p>4 Q Now, what I want to</p> <p>5 understand is the factual basis for</p> <p>6 your statement. Let's -- these are a</p> <p>7 couple of statements. Let's deal with</p> <p>8 the last one.</p> <p>9 It is the custom and practice</p> <p>10 of music publishers to review cue</p> <p>11 sheets for accuracy and correct any</p> <p>12 mistakes. This is true of even</p> <p>13 publishers who consider themselves to</p> <p>14 be production music libraries.</p> <p>15 What's the factual basis for</p> <p>16 your statement of that being the custom</p> <p>17 and practice?</p> <p>18 A The -- in terms of production</p> <p>19 music libraries, I actually didn't</p> <p>20 mention earlier that I meant to do, but</p> <p>21 I -- I first learned the word -- what</p> <p>22 the word "cue sheet" was when sitting</p> <p>23 with my uncle who actually had a stack</p> <p>24 of them and he explained to me what</p> <p>25 they were. And he was -- he was</p>

<p style="text-align: right;">Page 174</p> <p>1 KOHN</p> <p>2 reviewing them.</p> <p>3 I don't have any specific</p> <p>4 recollection of what they -- where they</p> <p>5 were from and where they got them. It</p> <p>6 was actually paper that he got. It</p> <p>7 would have -- back in the '80s. Then</p> <p>8 maybe ASCAP would have sent it to him.</p> <p>9 But if he didn't make sure that the cue</p> <p>10 sheets were filed properly with ASCAP,</p> <p>11 he wouldn't have gotten the performance</p> <p>12 money on the back end, which is what he</p> <p>13 was explaining to me. Because he</p> <p>14 talked -- he told me what a needle drop</p> <p>15 was. That he might charge \$200 for a</p> <p>16 needle drop. And I go that doesn't</p> <p>17 sound like a lot of money. How do you</p> <p>18 make money on this? And he says I get</p> <p>19 it all in the back end. And that</p> <p>20 morning he had a stack of cue sheets,</p> <p>21 whatever. And I didn't quite fully</p> <p>22 understand it at the time. Maybe over</p> <p>23 the years I got a better understanding</p> <p>24 of that.</p> <p>25 Q Who else --</p>	<p style="text-align: right;">Page 176</p> <p>1 KOHN</p> <p>2 Q That's not what he said.</p> <p>3 A Yes, he did.</p> <p>4 Q Okay.</p> <p>5 A He said -- that's the job of</p> <p>6 --</p> <p>7 Q Whatever it says, it says.</p> <p>8 A That's the job -- that's the</p> <p>9 job of commercial publishers. The CEO</p> <p>10 of Extreme said it himself. So one of</p> <p>11 the basis of my customs and practices</p> <p>12 is your own CEO saying in his</p> <p>13 deposition that Sony ATV does it.</p> <p>14 Dan Pounder in his</p> <p>15 declaration said that we don't have the</p> <p>16 resources to do it like Sony ATV does.</p> <p>17 I read that. Okay?</p> <p>18 So why don't you ask your own</p> <p>19 client why they don't follow the</p> <p>20 customs and practices of the industry</p> <p>21 that their own parent company follows</p> <p>22 as well. They say -- they chose not to</p> <p>23 do it because they say they don't have</p> <p>24 the resources. If they --</p> <p>25 Q I'm sorry. I didn't want to</p>
<p style="text-align: right;">Page 175</p> <p>1 KOHN</p> <p>2 A Now --</p> <p>3 Q I'm sorry. I didn't want to</p> <p>4 interrupt you.</p> <p>5 A Just so it is on the -- as I</p> <p>6 mentioned in the third bullet on the</p> <p>7 this page, according to BMI without cue</p> <p>8 sheets, it would be nearly impossible</p> <p>9 for such composers and publishers to be</p> <p>10 compensated for their work. The ASCAP</p> <p>11 website says the same thing and</p> <p>12 actually uses the term "production</p> <p>13 music libraries" in the sentence.</p> <p>14 COURT REPORTER: Uses the</p> <p>15 term?</p> <p>16 A Production music libraries in</p> <p>17 the sentence.</p> <p>18 Q Okay.</p> <p>19 A So the ASCAP website says it.</p> <p>20 The BMI website says it. Your client,</p> <p>21 the CEO of Extreme in his deposition</p> <p>22 said that's not something we do, they</p> <p>23 do that over at Sony ATV.</p> <p>24 Q Huh-uh.</p> <p>25 A Yes, he did.</p>	<p style="text-align: right;">Page 177</p> <p>1 KOHN</p> <p>2 interrupt you.</p> <p>3 A So the basis -- I've been to</p> <p>4 panels. I have discussed this with</p> <p>5 people in the industry over the past 35</p> <p>6 years since writing the book about how</p> <p>7 to make sure -- the whole book is Kohn</p> <p>8 on Music Licensing, there's a theme in</p> <p>9 the book is that you shouldn't be --</p> <p>10 that you should be willing to license</p> <p>11 your music out there so that you get</p> <p>12 the back end public performance</p> <p>13 royalties. Everyone knows. It's plain</p> <p>14 as sight. It's on the ABMI and ASCAP</p> <p>15 websites. You can't be a production</p> <p>16 music library or a music publisher and</p> <p>17 miss it, that if you don't have cue</p> <p>18 sheets on file, you're not going to be</p> <p>19 getting the largest piece of the income</p> <p>20 that music publishers make.</p> <p>21 So for your client to say</p> <p>22 bizarrely to me, bizarrely to the</p> <p>23 court, bizarrely to the songwriters</p> <p>24 that they represent that they don't</p> <p>25 have any responsibility, and for you to</p>

<p style="text-align: right;">Page 178</p> <p>1 KOHN</p> <p>2 bring in expert witnesses who dare --</p> <p>3 the head of APM, okay, filed an expert</p> <p>4 report in this case. He's a production</p> <p>5 music library, and he denies any</p> <p>6 responsibility.</p> <p>7 Of course he's going to come</p> <p>8 in -- you brought in an expert who's</p> <p>9 the CEO of a production music library</p> <p>10 to tell you what -- the practices in</p> <p>11 the industry. Of course he's going to</p> <p>12 say that we don't do it. That's not</p> <p>13 the practice, because he doesn't want</p> <p>14 to do the work.</p> <p>15 You have -- you have</p> <p>16 yesterday, the expert witness that you</p> <p>17 brought in yesterday that I sat in on</p> <p>18 and, that's Mr. Katz. He was on the</p> <p>19 board of APM. He also acquired a</p> <p>20 production music library called First</p> <p>21 Com. And he sat there brazenly telling</p> <p>22 Mr. Mardosian's [sic] --</p> <p>23 Q Marderosian.</p> <p>24 A -- Marderosian's client that</p> <p>25 they have no responsibility either to</p>	<p style="text-align: right;">Page 180</p> <p>1 KOHN</p> <p>2 interrupt the witness.</p> <p>3 A I am done.</p> <p>4 Q Oh, okay. Well, now we'll go</p> <p>5 back.</p> <p>6 So in addition to your uncle</p> <p>7 who you sat with about 30 years ago and</p> <p>8 he had a stack of cue sheets on his</p> <p>9 desk, what other production music</p> <p>10 libraries have you either talked to or</p> <p>11 found out as a matter of custom and</p> <p>12 practice reviewed cue sheets, any</p> <p>13 others?</p> <p>14 A I don't remember any others.</p> <p>15 I met Adam --</p> <p>16 Q Thank you. That's enough.</p> <p>17 A I --</p> <p>18 MR. MARDEROSIAN: Wait. What</p> <p>19 do you mean that's enough?</p> <p>20 MR. ZAKARIN: No, no, that's</p> <p>21 enough.</p> <p>22 He's answered it. He's</p> <p>23 answered the question.</p> <p>24 MR. MARDEROSIAN: No, he</p> <p>25 hasn't.</p>
<p style="text-align: right;">Page 179</p> <p>1 KOHN</p> <p>2 do it. He's saying it's custom --</p> <p>3 there's no custom and practice in the</p> <p>4 industry.</p> <p>5 If you read books like Todd</p> <p>6 Brabec, who you called a putz the other</p> <p>7 week at a deposition, which was</p> <p>8 appalling and it was insulting to me</p> <p>9 and the people that I know in the music</p> <p>10 industry --</p> <p>11 Q Uh-huh.</p> <p>12 A -- in his book he says that</p> <p>13 it's customs and practice in the music</p> <p>14 industry. You don't have to be around</p> <p>15 much to understand that it is custom</p> <p>16 and practice for production music</p> <p>17 libraries and music publishers as their</p> <p>18 basic responsibility to make sure the</p> <p>19 biggest source of income gets paid to</p> <p>20 the songwriters.</p> <p>21 Q Okay. Are you done?</p> <p>22 MR. MARDEROSIAN: Well,</p> <p>23 that's argumentative.</p> <p>24 MR. ZAKARIN: I just wanted</p> <p>25 to know because I don't want to</p>	<p style="text-align: right;">Page 181</p> <p>1 KOHN</p> <p>2 A No, I didn't say I didn't</p> <p>3 talk to production music libraries. I</p> <p>4 met Adam Taylor a number of years ago.</p> <p>5 I don't -- I talked about his</p> <p>6 production music library. I don't</p> <p>7 remember having discussed with him, but</p> <p>8 I might have discussed with him what he</p> <p>9 does and how he does it. There are</p> <p>10 lots of people -- how do you think I</p> <p>11 wrote Kohn on Music Licensing?</p> <p>12 Virtually every word in that book,</p> <p>13 other than the forms, without having</p> <p>14 discussed with everybody in the music</p> <p>15 industry that I was in touch with</p> <p>16 whether it was my uncle, my father,</p> <p>17 Barry Massarsky sitting at the end of</p> <p>18 the table, other people that I learned</p> <p>19 from, what custom and practice in the</p> <p>20 music industry are? How could I have</p> <p>21 possibly have described terms of art?</p> <p>22 Q Damned if I know.</p> <p>23 A How can I sit here and give</p> <p>24 you answers to your questions on issues</p> <p>25 like Sound Exchange and other things if</p>

<p style="text-align: right;">Page 182</p> <p>1 KOHN</p> <p>2 I didn't talk to a lot of people in the</p> <p>3 music industry to know what a custom</p> <p>4 and practice in the music industry is</p> <p>5 or it isn't?</p> <p>6 How does a federal judge in</p> <p>7 Los Angeles in federal court accept my</p> <p>8 testimony as customs and practice in</p> <p>9 the music industry as to the</p> <p>10 interpretation of the ASCAP contract</p> <p>11 with respect to performances in venues</p> <p>12 across the country?</p> <p>13 Q Are you done? I don't want</p> <p>14 to interrupt you.</p> <p>15 A That's not the -- I was</p> <p>16 obviously done.</p> <p>17 Q I can't tell.</p> <p>18 Now, so we've established</p> <p>19 that you didn't talk to any production</p> <p>20 music companies or find out what they</p> <p>21 do --</p> <p>22 A That's not true.</p> <p>23 Q -- but you talked --</p> <p>24 COURT REPORTER: I'm sorry.</p> <p>25 You didn't talk -- I'm sorry.</p>	<p style="text-align: right;">Page 184</p> <p>1 KOHN</p> <p>2 that I remember specifically.</p> <p>3 How would I be able to write</p> <p>4 about these things in the book without</p> <p>5 having talked to people about what they</p> <p>6 do for a living? And that's what I</p> <p>7 did --</p> <p>8 Q Do you write --</p> <p>9 A -- for over 35 years.</p> <p>10 Q -- do you write in the book</p> <p>11 about the custom and practice of music</p> <p>12 production library companies receiving</p> <p>13 and reviewing cue sheets?</p> <p>14 A No, I do not specifically --</p> <p>15 Q Okay.</p> <p>16 A -- cover in the book cue</p> <p>17 sheets. I can't cover every single</p> <p>18 custom and practice in the music</p> <p>19 industry. Now I will. And in the next</p> <p>20 version of the book, which will be</p> <p>21 coming out next year, is going to be</p> <p>22 talking about this. And I'm going to</p> <p>23 use this as an example of how</p> <p>24 songwriters can be mistreated by their</p> <p>25 publishers, and particularly production</p>
<p style="text-align: right;">Page 183</p> <p>1 KOHN</p> <p>2 Talk to any --</p> <p>3 Q Music production library</p> <p>4 companies --</p> <p>5 COURT REPORTER: Music</p> <p>6 production library companies.</p> <p>7 Q -- to find out what they do</p> <p>8 as a matter of custom and practice?</p> <p>9 A I -- that's not the</p> <p>10 testimony.</p> <p>11 Q Besides your uncle?</p> <p>12 A That's not my testimony.</p> <p>13 That's not my testimony.</p> <p>14 Q It's what --</p> <p>15 A No, it's not my testimony.</p> <p>16 I have talked to production</p> <p>17 music libraries, people who work for --</p> <p>18 Q Who?</p> <p>19 A I even met -- I can't tell</p> <p>20 you the names of the companies. I</p> <p>21 can't tell you the names of the</p> <p>22 companies. I can't tell you the</p> <p>23 individuals involved in those</p> <p>24 companies. I told you I met with Adam</p> <p>25 Taylor. That's one name that came up</p>	<p style="text-align: right;">Page 185</p> <p>1 KOHN</p> <p>2 music libraries not just for not</p> <p>3 reviewing cue sheets but for the</p> <p>4 shenanigans that have been going on in</p> <p>5 this -- this case with your CEO.</p> <p>6 Q I look forward to it. And</p> <p>7 look forward to reading it. I may even</p> <p>8 buy it.</p> <p>9 Now --</p> <p>10 A I would hope you --</p> <p>11 Q -- did you contact --</p> <p>12 A -- copyright.</p> <p>13 Q -- any music publishers to</p> <p>14 find out about whether they engage in</p> <p>15 this custom and practice of receiving</p> <p>16 and reviewing cue sheets? Any music</p> <p>17 publishers, not production music</p> <p>18 libraries, but music publishers? Have</p> <p>19 you gone --</p> <p>20 A I haven't --</p> <p>21 COURT REPORTER: I need a</p> <p>22 full question, please. If you</p> <p>23 wait until he finishes --</p> <p>24 Q Have you contacted -- right.</p> <p>25 Have you contacted any of them to find</p>

<p style="text-align: right;">Page 186</p> <p>1 KOHN</p> <p>2 out?</p> <p>3 A Since I was engaged in this</p> <p>4 case, no.</p> <p>5 Q Did you do a survey of any</p> <p>6 production music libraries or music</p> <p>7 publishers?</p> <p>8 A Since I've been engaged in</p> <p>9 this case, no.</p> <p>10 Q Did you do a survey before</p> <p>11 you were engaged in this case?</p> <p>12 A It depends on what you mean</p> <p>13 by "survey." If it means that --</p> <p>14 Q A survey to find --</p> <p>15 A If it means that --</p> <p>16 Q Let me finish.</p> <p>17 You're asking me. So I'm</p> <p>18 going to tell you.</p> <p>19 A Go ahead.</p> <p>20 Q A survey to determine whether</p> <p>21 it's a custom and practice of music</p> <p>22 publishers to receive and review and</p> <p>23 correct cue sheets.</p> <p>24 A You didn't define survey.</p> <p>25 Try again.</p>	<p style="text-align: right;">Page 188</p> <p>1 KOHN</p> <p>2 used the word "survey." He's</p> <p>3 asking you to define what you mean</p> <p>4 by survey so he can answer your</p> <p>5 question.</p> <p>6 Q Yeah. Did you -- did you</p> <p>7 submit questionnaires to music</p> <p>8 publishers -- you didn't talk to</p> <p>9 them -- but did you submit</p> <p>10 questionnaires or some sort of document</p> <p>11 to music publishers or production music</p> <p>12 libraries to find out if they engaged</p> <p>13 in this custom and practice of</p> <p>14 reviewing --</p> <p>15 A I --</p> <p>16 Q -- receiving, reviewing and</p> <p>17 correcting cue sheets?</p> <p>18 A I submitted questionnaires,</p> <p>19 no more than the expert witnesses that</p> <p>20 you have put forth have submitted</p> <p>21 questionnaires to provide answers to</p> <p>22 their questions.</p> <p>23 Q So the answer is no?</p> <p>24 A That's right.</p> <p>25 Q Okay. That's all we need to</p>
<p style="text-align: right;">Page 187</p> <p>1 KOHN</p> <p>2 Q Do you want to know what a</p> <p>3 survey is?</p> <p>4 A Yes.</p> <p>5 MR. MARDEROSIAN: Okay.</p> <p>6 We're getting conversational</p> <p>7 again.</p> <p>8 MR. ZAKARIN: No, no.</p> <p>9 MR. MARDEROSIAN: Maybe we</p> <p>10 need -- maybe we need another</p> <p>11 break.</p> <p>12 MR. ZAKARIN: No. No break.</p> <p>13 A We don't need a break.</p> <p>14 MR. MARDEROSIAN: Hold on</p> <p>15 everybody. Let's go back to</p> <p>16 questions and answers.</p> <p>17 MR. ZAKARIN: I want to know</p> <p>18 what the witness means by survey.</p> <p>19 That's all.</p> <p>20 MR. MARDEROSIAN: So, Don, he</p> <p>21 told you about what he went</p> <p>22 through in writing his book and</p> <p>23 the people that he talked to.</p> <p>24 MR. ZAKARIN: I heard him.</p> <p>25 MR. MARDEROSIAN: Now, you</p>	<p style="text-align: right;">Page 189</p> <p>1 KOHN</p> <p>2 know.</p> <p>3 Now, on Page 8 -- we're going</p> <p>4 back for a second. You talk about the</p> <p>5 50 percent of gross receipts, correct?</p> <p>6 A I'm sorry? Where do I talk</p> <p>7 about it?</p> <p>8 Q Page 8, you talk about, in</p> <p>9 the second bullet point. It's the</p> <p>10 50 percent of gross receipts. I'm just</p> <p>11 trying to orient you. The obligation</p> <p>12 to pay 50 percent of gross receipts.</p> <p>13 A Correct. Based on Page 8.</p> <p>14 Q Page 8, the second bullet.</p> <p>15 I'm just trying to --</p> <p>16 A Got it.</p> <p>17 Q -- work with -- you know, I'm</p> <p>18 just trying to orient the witness.</p> <p>19 Okay.</p> <p>20 Now, under Exhibit 3, K3, the</p> <p>21 payment of gross receipts is not</p> <p>22 unlimited. There are conditions,</p> <p>23 aren't there?</p> <p>24 MR. MARDEROSIAN: Objection.</p> <p>25 Calls for a legal opinion and</p>

48 (Pages 186 - 189)

<p style="text-align: right;">Page 190</p> <p>1 KOHN</p> <p>2 conclusion.</p> <p>3 Incomplete hypothetical.</p> <p>4 Let's refer to the document</p> <p>5 itself.</p> <p>6 Q Let's do that. Let's go to</p> <p>7 Paragraph 1.4 of the 2011 contract,</p> <p>8 which is Exhibit K3.</p> <p>9 MR. MARDEROSIAN: Did you say</p> <p>10 7.4, Don?</p> <p>11 MR. ZAKARIN: I said 1.4 I'm</p> <p>12 pretty sure.</p> <p>13 Q Do you have it in front of</p> <p>14 you?</p> <p>15 A Yes.</p> <p>16 Q And there are two categories</p> <p>17 of gross receipts really. One comes</p> <p>18 from blanket licenses; and one is,</p> <p>19 we'll call them, from needle drops,</p> <p>20 right?</p> <p>21 A I would say blanket licenses</p> <p>22 and discrete licenses.</p> <p>23 Q Okay.</p> <p>24 Discreet license is your</p> <p>25 terminology for a needle drop?</p>	<p style="text-align: right;">Page 192</p> <p>1 KOHN</p> <p>2 condition or whatever. It's a</p> <p>3 definition.</p> <p>4 Q Exclusion. Okay.</p> <p>5 That are actually received by</p> <p>6 Extreme or company or credited to</p> <p>7 Extreme or company against a prior</p> <p>8 advance.</p> <p>9 So it's all monies that are</p> <p>10 actually received, correct?</p> <p>11 MR. MARDEROSIAN: I'm going</p> <p>12 to object.</p> <p>13 It calls for a legal opinion</p> <p>14 and conclusion.</p> <p>15 A Well, it's actually received</p> <p>16 or credited to.</p> <p>17 Q Right. Credited against an</p> <p>18 advance, correct?</p> <p>19 MR. MARDEROSIAN: I'm going</p> <p>20 to object.</p> <p>21 It calls for a legal opinion</p> <p>22 and conclusion.</p> <p>23 A Well, it says what it says.</p> <p>24 Q Where there's an advance you</p> <p>25 get -- you may get a credit against</p>
<p style="text-align: right;">Page 191</p> <p>1 KOHN</p> <p>2 A No. Discrete license would</p> <p>3 be not a blanket license.</p> <p>4 Q Okay. Either way.</p> <p>5 Now, there are conditions in</p> <p>6 any event to what is gross receipts, is</p> <p>7 there not?</p> <p>8 A Let's read it and see what it</p> <p>9 says.</p> <p>10 MR. MARDEROSIAN: Objection.</p> <p>11 Q Okay. Let's read it.</p> <p>12 MR. MARDEROSIAN: Calls for a</p> <p>13 legal opinion and conclusion.</p> <p>14 Q Gross receipts mean --</p> <p>15 MR. MARDEROSIAN: Don, let me</p> <p>16 state the objection. Calls for</p> <p>17 legal opinion and conclusion.</p> <p>18 Argumentative.</p> <p>19 Q Gross receipts means all</p> <p>20 monies exclusive of value added tax.</p> <p>21 So we already have one exception,</p> <p>22 right, exclusive of value added tax?</p> <p>23 Do you disagree?</p> <p>24 A It's a definition. I'm not</p> <p>25 going to characterize something as a</p>	<p style="text-align: right;">Page 193</p> <p>1 KOHN</p> <p>2 that advance and that reduces the level</p> <p>3 of advance; am I right?</p> <p>4 MR. MARDEROSIAN: I'm going</p> <p>5 to object.</p> <p>6 It calls for a legal opinion</p> <p>7 and conclusion.</p> <p>8 Q You can answer.</p> <p>9 A Yes.</p> <p>10 Q Okay.</p> <p>11 And other than an advance,</p> <p>12 it's monies that are actually received,</p> <p>13 correct?</p> <p>14 MR. MARDEROSIAN: I'm going</p> <p>15 to object.</p> <p>16 It calls for a legal opinion</p> <p>17 and conclusion.</p> <p>18 A That's what it says.</p> <p>19 Q And then it goes through that</p> <p>20 represent the relevant share of Hype</p> <p>21 Music blanket licensing income, which</p> <p>22 is -- you agree that's a defined term</p> <p>23 in the agreement?</p> <p>24 MR. MARDEROSIAN: I'm going</p> <p>25 to object.</p>

<p style="text-align: right;">Page 198</p> <p>1 KOHN</p> <p>2 A Yes.</p> <p>3 Q And the phrase without</p> <p>4 prejudice to the generality of the</p> <p>5 foregoing, which is -- it doesn't -- it</p> <p>6 means it's without detracting from the</p> <p>7 foregoing provisions; is that right?</p> <p>8 A Well, it's --</p> <p>9 Q I mean, it's not in</p> <p>10 derogation of those -- the obligations</p> <p>11 on gross receipts, but these are</p> <p>12 certain deductions, so they're not</p> <p>13 restrictions?</p> <p>14 MR. MARDEROSIAN: I'm just</p> <p>15 going to object.</p> <p>16 It calls for a legal opinion</p> <p>17 and conclusion.</p> <p>18 Q Okay.</p> <p>19 If you have a view.</p> <p>20 A I don't have a view.</p> <p>21 Q Okay.</p> <p>22 A It says without prejudice to</p> <p>23 the generality of the foregoing.</p> <p>24 Q Do you have any understanding</p> <p>25 of what that meant?</p>	<p style="text-align: right;">Page 200</p> <p>1 KOHN</p> <p>2 mischaracterizes the testimony.</p> <p>3 A Yeah. I -- I don't remember</p> <p>4 it, but I can't comment on something I</p> <p>5 don't remember.</p> <p>6 Q Okay. If you don't remember</p> <p>7 it, then it is what it is.</p> <p>8 Now, you mentioned something</p> <p>9 in your book before about licensing,</p> <p>10 you know, and I want to try and pull</p> <p>11 it.</p> <p>12 I want to mark as Exhibit 4 a</p> <p>13 section of your -- or a page from your</p> <p>14 book, which I think is consistent with</p> <p>15 what you just said.</p> <p>16 MR. MARDEROSIAN: Objection.</p> <p>17 Argumentative.</p> <p>18 MR. ZAKARIN: Okay.</p> <p>19 It's Exhibit K4.</p> <p>20 THE WITNESS: What am I</p> <p>21 looking at?</p> <p>22 COURT REPORTER: One second.</p> <p>23 MR. ZAKARIN: Nothing yet.</p> <p>24 THE WITNESS: Oh.</p> <p>25 (Excerpt from the book</p>
<p style="text-align: right;">Page 199</p> <p>1 KOHN</p> <p>2 MR. MARDEROSIAN: Objection.</p> <p>3 Calls for a legal opinion and</p> <p>4 conclusion.</p> <p>5 MR. ZAKARIN: I just want to</p> <p>6 get an understanding of the</p> <p>7 witness' view.</p> <p>8 A It seems to be just</p> <p>9 clarifying what gross receipts include</p> <p>10 and what they don't include.</p> <p>11 Q Now, have you read Robert's</p> <p>12 deposition, Robert Marderosian that is?</p> <p>13 A I would have read it, yes.</p> <p>14 Q Do you recall that he</p> <p>15 testified that if Extreme did not get</p> <p>16 paid, it had no obligation to pay the</p> <p>17 plaintiffs any money?</p> <p>18 A If Extreme did not --</p> <p>19 MR. MARDEROSIAN: I'm going</p> <p>20 to object --</p> <p>21 Q If Extreme did not actually</p> <p>22 receive monies from licenses, it had no</p> <p>23 obligation to pay the plaintiffs?</p> <p>24 MR. MARDEROSIAN: For the</p> <p>25 record I'm going to object. That</p>	<p style="text-align: right;">Page 201</p> <p>1 KOHN</p> <p>2 entitled, Kohn On Music Licensing,</p> <p>3 was marked K Exhibit 4, for</p> <p>4 identification, as of this date.)</p> <p>5 Q General advice to music</p> <p>6 copyright owner. That's in your book.</p> <p>7 Did you write that or your</p> <p>8 father?</p> <p>9 A I wrote it.</p> <p>10 Q Okay.</p> <p>11 A But it was based on his</p> <p>12 philosophy.</p> <p>13 Q Okay.</p> <p>14 This is an admonishment to</p> <p>15 copyright owners that you have in your</p> <p>16 book, right? And I think it's sort of</p> <p>17 what you said before which is --</p> <p>18 A That's advice.</p> <p>19 Q -- do not let your perception</p> <p>20 of the value of the copyright go to</p> <p>21 your head. Remember that no matter how</p> <p>22 small the license fee you receive, in</p> <p>23 the long run you will tend to make up</p> <p>24 more than the difference from</p> <p>25 maintaining a continuing active</p>

<p style="text-align: right;">Page 202</p> <p>1 KOHN</p> <p>2 relationship between the song and the</p> <p>3 listening public.</p> <p>4 A Where are you reading from so</p> <p>5 I can --</p> <p>6 Q Top paragraph. You see --</p> <p>7 A Oh, before exploring?</p> <p>8 Q After exploring.</p> <p>9 Do you see do not get mired</p> <p>10 in the details for example --</p> <p>11 A Okay. Now I do.</p> <p>12 Q -- then do not let your</p> <p>13 perception.</p> <p>14 These are your words, aren't</p> <p>15 they?</p> <p>16 A Well, it says do not</p> <p>17 get mired on the details for example.</p> <p>18 Q Yeah.</p> <p>19 A Right? Okay.</p> <p>20 Q That says don't let the</p> <p>21 negotiation of legal boilerplate</p> <p>22 obscure your vision.</p> <p>23 A Right.</p> <p>24 Q And then you say, don't</p> <p>25 let -- this is -- you're saying this to</p>	<p style="text-align: right;">Page 204</p> <p>1 KOHN</p> <p>2 testimony.</p> <p>3 A What was I expressing before?</p> <p>4 Q About the licensing, that you</p> <p>5 want to encourage activity in the song.</p> <p>6 But regardless --</p> <p>7 A Well --</p> <p>8 Q -- you wrote those words,</p> <p>9 didn't you?</p> <p>10 A I think what --</p> <p>11 MR. MARDEROSIAN: Hold on.</p> <p>12 I'm just going to object.</p> <p>13 MR. ZAKARIN: Go ahead.</p> <p>14 MR. MARDEROSIAN: The</p> <p>15 question is vague and confusing --</p> <p>16 MR. ZAKARIN: I'll withdraw</p> <p>17 the question.</p> <p>18 MR. MARDEROSIAN: Thank you.</p> <p>19 MR. ZAKARIN: And I'll ask a</p> <p>20 new one.</p> <p>21 MR. MARDEROSIAN: Okay.</p> <p>22 Q You wrote those words in the</p> <p>23 book, didn't you?</p> <p>24 A Yes.</p> <p>25 Q And you believe that, don't</p>
<p style="text-align: right;">Page 203</p> <p>1 KOHN</p> <p>2 the copyright owners who are</p> <p>3 exploiting, right? Don't let your</p> <p>4 perception of the value of the</p> <p>5 copyright go to your head. Remember</p> <p>6 that no matter how small the license</p> <p>7 fee you receive, in the long run you</p> <p>8 will tend to make up more than the</p> <p>9 difference for maintaining a continuing</p> <p>10 active relationship between the song</p> <p>11 and the listening public. Don't let</p> <p>12 fear and uncertainty rule the day.</p> <p>13 Recognize that life is decision-making</p> <p>14 and don't be afraid to make a decision.</p> <p>15 A good rule to follow is when in doubt,</p> <p>16 license. Music copyright owner's</p> <p>17 primary interest should always be to</p> <p>18 encourage as much activity in the song</p> <p>19 as possible.</p> <p>20 I think that was sort of what</p> <p>21 you were expressing before, am I right?</p> <p>22 MR. MARDEROSIAN: I'm going</p> <p>23 to object.</p> <p>24 That's argumentative.</p> <p>25 Mischaracterizes the previous</p>	<p style="text-align: right;">Page 205</p> <p>1 KOHN</p> <p>2 you?</p> <p>3 A I agree with my father's</p> <p>4 general philosophy, yes.</p> <p>5 Q Well, that's your father's</p> <p>6 philosophy; and wrote it --</p> <p>7 A Yes.</p> <p>8 Q -- you said.</p> <p>9 A Yes.</p> <p>10 Q And if you didn't believe it,</p> <p>11 you wouldn't write it, would you?</p> <p>12 A No.</p> <p>13 Q Okay. So that is your view?</p> <p>14 A Well, you said something</p> <p>15 earlier. I mean, this has got to be</p> <p>16 read in the context of the reason why</p> <p>17 you -- maybe I could be more clear</p> <p>18 here. But when you're licensing, you</p> <p>19 are sync licensing. And the reason why</p> <p>20 you're going to make more money in the</p> <p>21 long run is you're going to get money</p> <p>22 in the back end. I think that's what</p> <p>23 you're referring to a moment ago about</p> <p>24 what I said earlier. That you license,</p> <p>25 you get the sync licenses out and you</p>

<p style="text-align: right;">Page 210</p> <p>1 KOHN</p> <p>2 Do you recall that statement?</p> <p>3 A Yes.</p> <p>4 Q Okay.</p> <p>5 A I said a year and a month. I</p> <p>6 think I corrected myself.</p> <p>7 Q Something -- that's why I</p> <p>8 wasn't specific and said a year or a</p> <p>9 year and a half, something like that.</p> <p>10 If it's a year and a month, it is what</p> <p>11 it is.</p> <p>12 Have you identified any</p> <p>13 performance income that the plaintiff</p> <p>14 should have received that they didn't</p> <p>15 receive as a result of that year and</p> <p>16 one month non-registration of a works</p> <p>17 registration?</p> <p>18 MR. MARDEROSIAN: I'm going</p> <p>19 to object that it's vague and</p> <p>20 overbroad and an incomplete</p> <p>21 hypothetical.</p> <p>22 Q You can answer the question.</p> <p>23 A I haven't been asked to opine</p> <p>24 on that.</p> <p>25 Q Okay.</p>	<p style="text-align: right;">Page 212</p> <p>1 KOHN</p> <p>2 registered in the name of Extreme's</p> <p>3 CEO. Extreme's CEO also registered</p> <p>4 songs under his names that duplicated</p> <p>5 titles of songs previously registered</p> <p>6 by Aron and Rob.</p> <p>7 That's the statement that you</p> <p>8 have on Page 9, correct?</p> <p>9 A That is a summary of another</p> <p>10 portion of my expert report.</p> <p>11 Q But I read it accurately,</p> <p>12 correct?</p> <p>13 A I believe you have. And if</p> <p>14 it's been transcribed accurately, we</p> <p>15 have that now.</p> <p>16 Q Okay.</p> <p>17 Can you tell me what you mean</p> <p>18 by the utter confusion? What was the</p> <p>19 utter confusion you are referring to?</p> <p>20 A I'm turning to the part of</p> <p>21 the report --</p> <p>22 Q Sure.</p> <p>23 A -- that that summarizes.</p> <p>24 Q Sure.</p> <p>25 This is the utter confusion</p>
<p style="text-align: right;">Page 211</p> <p>1 KOHN</p> <p>2 So that's not part of your</p> <p>3 brief; is that right?</p> <p>4 A It wasn't in my report, and I</p> <p>5 wasn't asked to have an opinion on it.</p> <p>6 Q Okay. Turn to Page 9, if you</p> <p>7 would.</p> <p>8 There are some statements</p> <p>9 that I want deal with, and one of them</p> <p>10 starts on the first full bullet point</p> <p>11 in the page. It says complicating the</p> <p>12 delay in registration. The accurate</p> <p>13 tracking of performance and the</p> <p>14 collection and distribution of Aron and</p> <p>15 Robert's writer share of performance</p> <p>16 royalties was the utter confusion that</p> <p>17 resulted from the changing of many of</p> <p>18 the song titles originally chosen by</p> <p>19 Aron and Robert. Many of these changes</p> <p>20 were apparently -- many of these</p> <p>21 changes were made apparently by</p> <p>22 Extreme's CEO and the changes caused</p> <p>23 duplicate titles in Extreme's catalogs,</p> <p>24 including duplicates that caused</p> <p>25 confusion with songs previously</p>	<p style="text-align: right;">Page 213</p> <p>1 KOHN</p> <p>2 from the changing of titles. That's</p> <p>3 what I want to see.</p> <p>4 A On Page 37 of my report I</p> <p>5 mention that Mr. Elias of Viacom told</p> <p>6 Aron and Rob, I think it was in an</p> <p>7 e-mail, that Extreme would</p> <p>8 cross-reference all of Aron and Rob's</p> <p>9 song titles with existing tracks in the</p> <p>10 Extreme library to make sure there were</p> <p>11 no duplicates.</p> <p>12 Q Does that reflect any</p> <p>13 confusion?</p> <p>14 A I'm trying to answer your</p> <p>15 question. I'm not finished.</p> <p>16 Q Okay.</p> <p>17 A Okay.</p> <p>18 The next paragraph shows, and</p> <p>19 also my recollection from the Extreme</p> <p>20 CEO's deposition where he admitted to</p> <p>21 changing titles of the songs. All</p> <p>22 right? The next paragraph here says,</p> <p>23 one of the most popular songs among</p> <p>24 those delivered by Aron and Robert.</p> <p>25 Now, as you know, documents</p>

<p style="text-align: right;">Page 242</p> <p>1 KOHN</p> <p>2 deposition as marketing.</p> <p>3 I look at a guy who's filing</p> <p>4 under various names and I see 13,000</p> <p>5 songs under his name. So he -- as he</p> <p>6 explained in his deposition, well,</p> <p>7 10,000 of those were under, I think it</p> <p>8 was Bruce Fingers or something like</p> <p>9 that, that gets funneled off to a</p> <p>10 company that he's the CEO of, which I</p> <p>11 think is a Sony ATV company. Right?</p> <p>12 And I look at that and I go</p> <p>13 well something seems to be wrong here.</p> <p>14 All right? Using alias names to funnel</p> <p>15 off to another company. Now, my</p> <p>16 understanding is from his deposition,</p> <p>17 which I'm not going to dispute because</p> <p>18 he says what he says, that that money</p> <p>19 is being paid to other songwriters.</p> <p>20 Fine. That leaves 4,000 songs under</p> <p>21 his name at ASCAP. I don't know how</p> <p>22 many songs are filed under his name at</p> <p>23 PRS because I don't have any access to</p> <p>24 the PRS repertoire database. So I</p> <p>25 haven't had a chance to look at that.</p>	<p style="text-align: right;">Page 244</p> <p>1 KOHN</p> <p>2 going to get one out of 24,000 of the</p> <p>3 income coming in from these blanket</p> <p>4 licenses.</p> <p>5 You could have 3,000 of Russ</p> <p>6 Emanuel songs that have never been</p> <p>7 sync'd during the period of time of the</p> <p>8 blanket license that gets a piece of</p> <p>9 the action, the same piece of the</p> <p>10 action that songs that were used and</p> <p>11 sync'd during the period. I have seen</p> <p>12 your experts incredibly try to explain</p> <p>13 to this court -- I just got a</p> <p>14 dizziness. Excuse me. It's from my ear</p> <p>15 problem.</p> <p>16 Okay. Hold on. Sorry.</p> <p>17 MR. BAGLEY: Do you want to</p> <p>18 take a short break?</p> <p>19 THE WITNESS: I might because</p> <p>20 if i -- I might faint.</p> <p>21 MR. MARDEROSIAN: Why don't</p> <p>22 we do that?</p> <p>23 THE WITNESS: No, no. Wait,</p> <p>24 I think I just recovered.</p> <p>25 The room spins a little bit,</p>
<p style="text-align: right;">Page 243</p> <p>1 KOHN</p> <p>2 So I see 4,000 songs. I go</p> <p>3 to the Extreme website and I pull out</p> <p>4 about 3,500 songs and I've eliminated</p> <p>5 duplicates of all -- using the aliases</p> <p>6 that I knew of, not the aliases I</p> <p>7 didn't know of, of 20 -- it was about</p> <p>8 2500 to 3,000 songs, which I don't</p> <p>9 know, I haven't been able to dig into</p> <p>10 the detail here. I need to ask for</p> <p>11 discovery on this, which I think has</p> <p>12 not been produced.</p> <p>13 But there are 24,000 --</p> <p>14 you're shaking your heads.</p> <p>15 Q I'm am. But I'm allowed.</p> <p>16 A Fine.</p> <p>17 There are 24,000 songs among</p> <p>18 the catalog that's been allocated. If</p> <p>19 3,000 songs are the CEO's songs, and if</p> <p>20 you are using a non-usage based way of</p> <p>21 allocating to the songwriters, if</p> <p>22 you're using based upon the number of</p> <p>23 songs, then you're taking a song like</p> <p>24 Mulholland Drive and Figueroa Street</p> <p>25 and these other songs, and I'm only</p>	<p style="text-align: right;">Page 245</p> <p>1 KOHN</p> <p>2 you know, when I am doing this.</p> <p>3 Okay. Let me -- let me</p> <p>4 finish. Okay.</p> <p>5 A All right.</p> <p>6 So your experts get up there</p> <p>7 and say I said that everything's on</p> <p>8 actual usage basis and that's the way</p> <p>9 its got to be. Well, that's a strawman</p> <p>10 that they created to defend the</p> <p>11 practice which only has occurred in the</p> <p>12 instance of Extreme, as far as I know.</p> <p>13 And maybe one other, and that is you</p> <p>14 had -- yesterday Mr. Katz said that he</p> <p>15 acquired a company called First Com</p> <p>16 that apparently also allocated its</p> <p>17 songs, a production music library based</p> <p>18 upon the number of songs in the</p> <p>19 catalog.</p> <p>20 What Dan Pounder admitted</p> <p>21 to -- Dan Pounder admitted to that he</p> <p>22 knows songs are going to get paid that</p> <p>23 never were used in a sync license or</p> <p>24 performed at all. You have experts,</p> <p>25 maybe one sitting in this room, that</p>

<p style="text-align: right;">Page 246</p> <p>1 KOHN</p> <p>2 suggests that people are paying for an</p> <p>3 access license. Well, show me where in</p> <p>4 the copyright law you have an exclusive</p> <p>5 right of access. What a blanket</p> <p>6 license is --</p> <p>7 COURT REPORTER: I'm sorry?</p> <p>8 Copyright law where you?</p> <p>9 A An exclusive right of access.</p> <p>10 You have an exclusive right to</p> <p>11 reproduce the work in copies or phono</p> <p>12 records. But you have an exclusive</p> <p>13 right to prepare derivative works. You</p> <p>14 have an exclusive right of</p> <p>15 distribution, exclusive right of public</p> <p>16 performance, et cetera, et cetera.</p> <p>17 You don't have an exclusive</p> <p>18 right of access. What you are doing</p> <p>19 with a blanket license, you are</p> <p>20 providing your customer with the</p> <p>21 ability to reduce transaction costs by</p> <p>22 saying you can choose anything among</p> <p>23 these to use in your works. Okay?</p> <p>24 You can choose any of these</p> <p>25 works to sync. The license is for the</p>	<p style="text-align: right;">Page 248</p> <p>1 KOHN</p> <p>2 Q Every bit of it.</p> <p>3 A Good.</p> <p>4 Q Are you done?</p> <p>5 A No, I'm not done.</p> <p>6 Q Oh, good. Keep going.</p> <p>7 A So I look at this, and I see</p> <p>8 this. And you've brought in people who</p> <p>9 are from the production music library</p> <p>10 businesslike; like Mr. Katz and Adam</p> <p>11 Taylor who are basically circling the</p> <p>12 wagon saying that this is something</p> <p>13 that's proper and standard -- oh, sure,</p> <p>14 it's standard of practice to do that,</p> <p>15 but they don't even do it themselves.</p> <p>16 Adam Taylor wouldn't possibly do it</p> <p>17 himself. Why would he -- how could he</p> <p>18 pay the song writers to do that?</p> <p>19 Now, next stage. Next stage.</p> <p>20 The joint venture agreement between</p> <p>21 Viacom and Extreme -- it's getting late</p> <p>22 in the day -- the joint venture</p> <p>23 agreement specifically says -- I have</p> <p>24 this in my report. And can you sit</p> <p>25 there and smile all you want because I</p>
<p style="text-align: right;">Page 247</p> <p>1 KOHN</p> <p>2 sync -- the license is for the fixing.</p> <p>3 The license is for the reproduction.</p> <p>4 And the license could be for the public</p> <p>5 performance as well, whether it's BMI</p> <p>6 or whether it's on a direct license.</p> <p>7 So if you take the -- if you</p> <p>8 take what I just said and you have</p> <p>9 someone with several thousand songs in</p> <p>10 a catalog, and that's not been -- you</p> <p>11 know, I don't know how many songs he</p> <p>12 has in the catalog. He's getting --</p> <p>13 people are getting paid for not being</p> <p>14 sync'd. And you have experts coming in</p> <p>15 here saying that's a standard practice</p> <p>16 in the industry. They know that's not</p> <p>17 true. They know that's not true. Adam</p> <p>18 Taylor in his report doesn't do it that</p> <p>19 way. APM does it based upon usage. He</p> <p>20 says so in his report. He gets usage</p> <p>21 reports from his licensees. It's</p> <p>22 not -- I never said it has to be actual</p> <p>23 usage. Actual usage might be data</p> <p>24 reports or performances coming in.</p> <p>25 Okay? Follow what I'm saying?</p>	<p style="text-align: right;">Page 249</p> <p>1 KOHN</p> <p>2 know --</p> <p>3 Q I am smiling.</p> <p>4 A Yeah, you are smiling.</p> <p>5 Q I am. I know.</p> <p>6 A You'll be really happy to see</p> <p>7 what's going happen. Right?</p> <p>8 Q I'm enjoying this.</p> <p>9 A Okay. Terrific, you know.</p> <p>10 So the joint venture</p> <p>11 agreement between Viacom and Extreme</p> <p>12 has a provision in it that says advise</p> <p>13 that Extreme will make sure that Viacom</p> <p>14 gets paid -- its the public performance</p> <p>15 royalties directly from performance</p> <p>16 rights societies, BMI.</p> <p>17 The reason why they did that</p> <p>18 is because Viacom is not in the same</p> <p>19 position as an APM. Right? You said</p> <p>20 it yourself, and I quoted you in my</p> <p>21 expert report. You said that the --</p> <p>22 Viacom is acting both -- and I'm not</p> <p>23 trying to be contentious here. I'm</p> <p>24 just trying to get everyone -- I'd like</p> <p>25 to be helpful to the court so they can</p>

<p style="text-align: right;">Page 250</p> <p>1 KOHN</p> <p>2 understand what's going on here.</p> <p>3 But Viacom entered into this</p> <p>4 agreement because when you are a</p> <p>5 broadcaster and when you are a</p> <p>6 publisher, you have a conflict of</p> <p>7 interest. The broadcaster's -- part of</p> <p>8 his business is to minimize the music</p> <p>9 costs that are coming in that -- you</p> <p>10 know, and that's why they even set up</p> <p>11 New Remote, MTV to do that. Music</p> <p>12 publisher is to maximize the income</p> <p>13 coming in for him and as well as any</p> <p>14 songwriters who might deserve a share</p> <p>15 of that. That is the conflict.</p> <p>16 So Viacom could not, for</p> <p>17 example, enter -- after entering into</p> <p>18 the 2010 agreement issue a license to</p> <p>19 itself to, let's say, do a direct</p> <p>20 performance license because that would</p> <p>21 of -- it doesn't say that they can't.</p> <p>22 Mr. Zakarin, over here, keeps on saying</p> <p>23 where does it say in this agreement you</p> <p>24 can't do it. And I keep on saying it's</p> <p>25 an implied obligation of good faith and</p>	<p style="text-align: right;">Page 252</p> <p>1 KOHN</p> <p>2 says to Extreme, you will make sure</p> <p>3 that you will file work registrations</p> <p>4 and cue sheeting, and whatever it says</p> <p>5 in that paragraph that I have in my</p> <p>6 report, so that we get our income paid</p> <p>7 directly from the performance right's</p> <p>8 society. The next paragraph says all</p> <p>9 other income that needs to be paid to</p> <p>10 us and to composers, you guys</p> <p>11 administer. They separated out</p> <p>12 performance licensing from the rest of</p> <p>13 us. That protected Viacom from any</p> <p>14 accusation from songwriters that they</p> <p>15 were not, you know, trying to screw</p> <p>16 them out of their public performance</p> <p>17 royalties because that's all they were</p> <p>18 going to get out of the 2010 agreement.</p> <p>19 MR. HWANG: Apparently it</p> <p>20 wasn't enough protection.</p> <p>21 A Apparently it wasn't enough</p> <p>22 protection because Extreme immediately</p> <p>23 gave direct public performance licenses</p> <p>24 to ABC, Disney, NBC, CBS, Fox, Turner</p> <p>25 Broadcasting, five or six, seven</p>
<p style="text-align: right;">Page 251</p> <p>1 KOHN</p> <p>2 fair dealing.</p> <p>3 There's no way in hell that</p> <p>4 Viacom could have issued to itself a</p> <p>5 free performance license, a direct</p> <p>6 performance license to eliminate its</p> <p>7 obligations to the boys. You know</p> <p>8 that. Okay. So when it entered into</p> <p>9 the agreement with Extreme, it had to</p> <p>10 recognize its special position as both</p> <p>11 the publisher and a broadcaster. APM</p> <p>12 is not in that position. It's owned by</p> <p>13 Sony ATV and so is First Com and so is</p> <p>14 the other production music library that</p> <p>15 they have. That's a different</p> <p>16 position.</p> <p>17 You wanted to make sure that</p> <p>18 your interest was aligned. And I'm</p> <p>19 pointing to you because you represent</p> <p>20 Viacom. You wanted to make your</p> <p>21 interest aligned with the songwriters</p> <p>22 to keep you out of trouble of doing the</p> <p>23 wrong thing, especially when you're</p> <p>24 dealing with a third party. So the</p> <p>25 reason why that joint venture agreement</p>	<p style="text-align: right;">Page 253</p> <p>1 KOHN</p> <p>2 other -- you know, I have -- we have</p> <p>3 all the direct performance licenses,</p> <p>4 you know, that was produced here.</p> <p>5 They went ahead and did all</p> <p>6 of that. Okay. So now the money is</p> <p>7 not going through BMI anymore, to the</p> <p>8 songwriters or to Viacom. The money</p> <p>9 for performances presumably it could</p> <p>10 only be through -- back through</p> <p>11 Extreme. Now remember, Extreme decided</p> <p>12 not to do this on the basis of usage,</p> <p>13 which is what you know BMI would.</p> <p>14 That's why Viacom said I want BMI doing</p> <p>15 it, and not you doing it. That's why I</p> <p>16 say, look, you should be sitting on our</p> <p>17 side of the table here.</p> <p>18 So it's not a question. So</p> <p>19 the -- now -- so the money is</p> <p>20 throwing -- will be flowing through.</p> <p>21 What does Viacom do with a direct</p> <p>22 public performance license? It goes to</p> <p>23 BMI to get its cost reduced. It</p> <p>24 gets -- it goes to BMI to say we should</p> <p>25 pay you less -- less annual public</p>

<p style="text-align: right;">Page 274</p> <p>1 KOHN</p> <p>2 the way I read it.</p> <p>3 Q Okay.</p> <p>4 A But, you know, it may have</p> <p>5 been ambiguous. There was a reason why</p> <p>6 I used word the apparently.</p> <p>7 Q I just want to make sure what</p> <p>8 we're saying here. So if you were</p> <p>9 using the term apparently, you're not</p> <p>10 100 sure, as you sit here now, what</p> <p>11 Russel Emanuel said. But your source</p> <p>12 of whether Russel Emanuel changed</p> <p>13 titles is from his deposition; is that</p> <p>14 correct?</p> <p>15 A Yes.</p> <p>16 Q Okay.</p> <p>17 A I think -- unless there was</p> <p>18 something else that I received that I</p> <p>19 read and gave me that impression in my</p> <p>20 mind, but sitting here today that's the</p> <p>21 only thing I can recollect.</p> <p>22 Q Can you identify specific</p> <p>23 instances where the changed titles</p> <p>24 created confusion with songs previously</p> <p>25 registered in the name of Mr. Emanuel</p>	<p style="text-align: right;">Page 276</p> <p>1 KOHN</p> <p>2 pages here. So the Mulholland Drive</p> <p>3 one was an instance in which, as I</p> <p>4 mentioned earlier, where Aron and Rob</p> <p>5 were told that Extreme would be --</p> <p>6 might be changing titles to make sure</p> <p>7 there were any duplicates that they</p> <p>8 weren't being -- there would not be any</p> <p>9 duplicates with respect to any other</p> <p>10 songs in their catalog. And that</p> <p>11 didn't occur here. And that did</p> <p>12 apparently cause confusion because</p> <p>13 money that should have gone to Rob and</p> <p>14 Aron went to Thomas Bergersen and</p> <p>15 Nicholas Phoenix. If there's a</p> <p>16 situation where confusion may have</p> <p>17 cussed a mispayment, that's certainly</p> <p>18 one. I don't --</p> <p>19 Q I don't disagree. But I'm</p> <p>20 looking --</p> <p>21 A Okay.</p> <p>22 So let's go through these so</p> <p>23 I can be complete.</p> <p>24 Q On Page 40 -- I haven't seen</p> <p>25 anything on Pages 37, 38, 39. But now</p>
<p style="text-align: right;">Page 275</p> <p>1 KOHN</p> <p>2 or under one of his known pseudonyms?</p> <p>3 MR. MARDEROSIAN: I'm just</p> <p>4 going to object.</p> <p>5 The question is vague,</p> <p>6 ambiguous, and overbroad.</p> <p>7 Incomplete hypothetical.</p> <p>8 Q Do you understand the</p> <p>9 question?</p> <p>10 A Well, to the extent I do, I</p> <p>11 think I discussed several examples,</p> <p>12 which I thought I had listed on Pages</p> <p>13 36 through --</p> <p>14 Q Thirty-six, I don't see</p> <p>15 anything.</p> <p>16 A Thirty-six though, I guess,</p> <p>17 40.</p> <p>18 Q I'm looking at that. Okay.</p> <p>19 You're not suggesting that</p> <p>20 Mulholland Drive, which I think you</p> <p>21 identified as a confusion issue, is</p> <p>22 Russel Emanuel song?</p> <p>23 A No. What I -- what I</p> <p>24 suggest -- no.</p> <p>25 Yeah, so this is the general</p>	<p style="text-align: right;">Page 277</p> <p>1 KOHN</p> <p>2 you have Extreme change on Page 40, you</p> <p>3 refer to By the Boot Straps in the</p> <p>4 middle paragraph. Okay.</p> <p>5 A But on page --</p> <p>6 Q Bruce Fingers.</p> <p>7 A Hold on a second.</p> <p>8 Q Okay. This is where you're</p> <p>9 showing various aliases or pseudonyms,</p> <p>10 starting on Page 40.</p> <p>11 A Okay.</p> <p>12 So on Page 39 --</p> <p>13 Q Okay.</p> <p>14 A -- middle paragraph, you</p> <p>15 know, the first paragraph is where I</p> <p>16 point out I've seen cue sheets</p> <p>17 generated by Viacom which says Mix Tape</p> <p>18 as the composer name.</p> <p>19 Q How many --</p> <p>20 A The second --</p> <p>21 Q I'm sorry.</p> <p>22 How many cue sheets have you</p> <p>23 seen that say Mix Tape?</p> <p>24 A A handful.</p> <p>25 Q More than one?</p>

70 (Pages 274 - 277)

<p style="text-align: right;">Page 278</p> <p>1 KOHN</p> <p>2 A Yeah. Yeah. There was like</p> <p>3 about five of them or six of them</p> <p>4 mentioned yesterday.</p> <p>5 Q I don't think they're all Mix</p> <p>6 Tape, but it is whatever it is. The</p> <p>7 record will reflect whatever it is.</p> <p>8 A I thought I saw it but --</p> <p>9 Q There's certainly at least</p> <p>10 one that was Mix Tape.</p> <p>11 A Okay.</p> <p>12 I think there's five or six,</p> <p>13 but anyway.</p> <p>14 Q Out of how may -- by the way,</p> <p>15 out of how many, do you know?</p> <p>16 A I don't know.</p> <p>17 Q A thousand?</p> <p>18 A I don't know.</p> <p>19 Q How many cue sheets did you</p> <p>20 look at?</p> <p>21 A Oh, there were a lot. But I</p> <p>22 flipped through them and -- on my</p> <p>23 computer.</p> <p>24 Q I'm not suggesting that you</p> <p>25 studied them.</p>	<p style="text-align: right;">Page 280</p> <p>1 KOHN</p> <p>2 out --</p> <p>3 A So the next thing I want to</p> <p>4 point out here. So I have in the</p> <p>5 middle of 39.</p> <p>6 Q Yes.</p> <p>7 A Extreme COO Dan Pounder</p> <p>8 dismisses this as a one-off mistake.</p> <p>9 Q This is referring to the</p> <p>10 Mulholland Drive issue.</p> <p>11 A Yes.</p> <p>12 Q I don't think it's the Mix</p> <p>13 Tape.</p> <p>14 A Okay. Fair enough.</p> <p>15 Q It's he Mulholland Drive</p> <p>16 issue.</p> <p>17 COURT REPORTER: Okay.</p> <p>18 Gentlemen, you're talking over</p> <p>19 each other.</p> <p>20 MR. MARDEROSIAN: This record</p> <p>21 is going to miserable. I mean --</p> <p>22 A I'm reading. Okay. A single</p> <p>23 misattribution. This is in -- I cited</p> <p>24 the page. But he is contradicted by</p> <p>25 the testimony of his own -- of his CEO</p>
<p style="text-align: right;">Page 279</p> <p>1 KOHN</p> <p>2 A I don't know.</p> <p>3 Q Do you have an estimate</p> <p>4 whether a 1,000 or 2,000 cue sheets?</p> <p>5 A No, I don't.</p> <p>6 Q You don't know?</p> <p>7 A No.</p> <p>8 Q There are a lot?</p> <p>9 A Yeah. You bet there are.</p> <p>10 Q And so we're now talking</p> <p>11 about five or six cue sheets out of</p> <p>12 however many you looked at?</p> <p>13 A Regarding the most popular</p> <p>14 song these two guys wrote for your</p> <p>15 client --</p> <p>16 Q Albeit --</p> <p>17 A -- where money was actually</p> <p>18 received by somebody else rather than</p> <p>19 the client.</p> <p>20 Q Performance income.</p> <p>21 A Okay.</p> <p>22 Q We've gone through that</p> <p>23 particular one.</p> <p>24 A Okay. Fine.</p> <p>25 Q I'm just trying to find</p>	<p style="text-align: right;">Page 281</p> <p>1 KOHN</p> <p>2 who testified with respect to the</p> <p>3 company's retitling practices. So the</p> <p>4 CEO, Russel Emanuel himself, says that</p> <p>5 retitling practices, it's changed over</p> <p>6 the years. It used to be practice that</p> <p>7 it didn't matter at all. More</p> <p>8 recently, and we're talking about</p> <p>9 probably 2018, Dan Pounder and his</p> <p>10 department have kind of tightened up</p> <p>11 that process because we were made aware</p> <p>12 of some title changes going into</p> <p>13 suspense.</p> <p>14 Q It doesn't say changes. Some</p> <p>15 tiles going into suspense.</p> <p>16 A Oh. Some titles -- thank</p> <p>17 you. Some titles going into suspense.</p> <p>18 I'm losing my voice today. The society</p> <p>19 started -- maybe it was too long of a</p> <p>20 speech. I don't know really. Okay.</p> <p>21 The societies -- that's just humor.</p> <p>22 Okay. Thank you for laughing on the</p> <p>23 other side.</p> <p>24 The society started to put --</p> <p>25 I can't -- this is what he says. I'm</p>

<p style="text-align: right;">Page 282</p> <p>1 KOHN</p> <p>2 going to read that line. Because we</p> <p>3 were made aware of some titles going</p> <p>4 into suspense, dash, the societies</p> <p>5 started to put, dash, I can't remember</p> <p>6 the term he uses, dash, anyway they put</p> <p>7 the titles on hold until they can</p> <p>8 format any dispute. I would say that's</p> <p>9 the only -- that's only in the past</p> <p>10 couple of years until we had -- until</p> <p>11 then we had multiple works with the</p> <p>12 same titles.</p> <p>13 I point that out because</p> <p>14 apparently this showed to me that they</p> <p>15 knew they had a title problem, and it</p> <p>16 was causing problems. Money was not</p> <p>17 being spent. It wasn't being done</p> <p>18 correctly. Money was being put in</p> <p>19 suspense and not being distributed</p> <p>20 correctly as a result of a policy that</p> <p>21 went on from 2010, at least as early as</p> <p>22 that, until 2018. That shows me that</p> <p>23 there is a problem. That shows me that</p> <p>24 if nothing else they didn't do their</p> <p>25 job, and that means a breach of</p>	<p style="text-align: right;">Page 284</p> <p>1 KOHN</p> <p>2 to be -- very likely to be a unique</p> <p>3 title. Nevertheless, someone at</p> <p>4 Extreme, and I said perhaps Russel</p> <p>5 Emanuel --</p> <p>6 Q Speculating?</p> <p>7 A I was speculating. From his</p> <p>8 own words, who admittedly personally</p> <p>9 changing song titles, and my</p> <p>10 recollection is is that he was talking</p> <p>11 about these boys titles. Changed the</p> <p>12 title to By the Boot Straps. There</p> <p>13 happens to be a song registered at</p> <p>14 ASCAP called By the Boot Straps.</p> <p>15 COURT REPORTER: Sir, I know</p> <p>16 you're reading; but I need you to</p> <p>17 slow down.</p> <p>18 A There happens to be a song</p> <p>19 registered at ASCAP called By the Boot</p> <p>20 Straps, published by a PRS music</p> <p>21 publisher called Directors Cuts</p> <p>22 Production Music Limited, I don't know</p> <p>23 who owns that, which according to</p> <p>24 ASCAP's publically available records is</p> <p>25 either owned by or administered by</p>
<p style="text-align: right;">Page 283</p> <p>1 KOHN</p> <p>2 contract. But that's a legal</p> <p>3 conclusion that I shouldn't be making.</p> <p>4 I know. Let's go on.</p> <p>5 Q My question --</p> <p>6 A I'm getting there.</p> <p>7 Q So -- all right.</p> <p>8 A -- I'm just trying to get</p> <p>9 help you get there sooner so we can</p> <p>10 work through the deposition.</p> <p>11 Okay. In fact, so Mr. Elias,</p> <p>12 as I said earlier, of Viacom, after he</p> <p>13 had suggested to the plaintiffs that</p> <p>14 their titles would be -- might be</p> <p>15 changed so that they wouldn't be the</p> <p>16 same as other titles, here I say the</p> <p>17 exact opposite seem to be -- the exact</p> <p>18 opposite was happening.</p> <p>19 Q Do you remember what my</p> <p>20 question was because it may help?</p> <p>21 A Yeah. Okay.</p> <p>22 So, for example, a song</p> <p>23 written by Aron and Robert delivered to</p> <p>24 Viacom, which Extreme published, was</p> <p>25 entitled ML Lettie. I considered this</p>	<p style="text-align: right;">Page 285</p> <p>1 KOHN</p> <p>2 Extreme. The song was cowritten by</p> <p>3 Mr. Bruce Fingers, which is an alias</p> <p>4 that he uses to funnel money -- the</p> <p>5 songwriter's money to a corporation</p> <p>6 called Fingers -- I forgot what it is.</p> <p>7 Q Bleeding Fingers.</p> <p>8 A Bleeding Fingers.</p> <p>9 Q Let me try and help you to</p> <p>10 cut through this.</p> <p>11 A Go ahead. Thank you.</p> <p>12 Q You've identified here on</p> <p>13 Page 40 one song which apparently is,</p> <p>14 you know, changed to a title that</p> <p>15 corresponds to a title of Russel,</p> <p>16 Emanuel under one of his pseudonyms,</p> <p>17 correct?</p> <p>18 A Um-hum.</p> <p>19 Q Have you identified any</p> <p>20 income that was diverted to Russel</p> <p>21 Emanuel as a result of that title?</p> <p>22 A I wasn't asked to go into</p> <p>23 that.</p> <p>24 Q So you don't know? You don't</p> <p>25 know, correct?</p>

<p style="text-align: right;">Page 286</p> <p>1 KOHN</p> <p>2 A I wasn't asked to opine on</p> <p>3 that if I have facts.</p> <p>4 Q So you don't know? That's</p> <p>5 all I'm saying?</p> <p>6 MR. MARDEROSIAN: I don't</p> <p>7 think you produced income records</p> <p>8 reflecting Mr. Emanuel's</p> <p>9 royalties, Don.</p> <p>10 Q Have you seen cue sheets or</p> <p>11 anything else, any other evidence that</p> <p>12 shows that income was diverted to --</p> <p>13 from the plaintiffs to Russel Emanuel</p> <p>14 on that song?</p> <p>15 MR. MARDEROSIAN: I'm just</p> <p>16 going to object.</p> <p>17 The question is vague and</p> <p>18 overbroad and an incomplete</p> <p>19 hypothetical.</p> <p>20 A I think if you would get in</p> <p>21 touch with ASCAP, I think it would</p> <p>22 be -- Bruce Fingers would be Russ</p> <p>23 Emanuel's Social Security number. So I</p> <p>24 don't know how that money eventually</p> <p>25 goes there. I don't have --</p>	<p style="text-align: right;">Page 288</p> <p>1 KOHN</p> <p>2 could say I don't know, but if you --</p> <p>3 A Would you repeat the question</p> <p>4 again so I can --</p> <p>5 Q Would you read it back,</p> <p>6 please.</p> <p>7 A It's getting very late in the</p> <p>8 day for me and I'm beginning to --</p> <p>9 MR. MARDEROSIAN: The</p> <p>10 objection stands.</p> <p>11 (Whereupon, the record was</p> <p>12 read.)</p> <p>13 A It did get diverted to --</p> <p>14 Q We've dealt with Mulholland</p> <p>15 Drive. I'm asking about this song.</p> <p>16 A Okay. Okay.</p> <p>17 Oh, I'm not thinking</p> <p>18 altogether right right now.</p> <p>19 No.</p> <p>20 Q Okay.</p> <p>21 There is then -- I'm trying</p> <p>22 to see if there was any other songs</p> <p>23 that you do -- that you mention. If</p> <p>24 you turn to Page 42, I think there's</p> <p>25 another one.</p>
<p style="text-align: right;">Page 287</p> <p>1 KOHN</p> <p>2 Q But that wasn't my question.</p> <p>3 My question was just -- I'm not</p> <p>4 disputing whether or not that is Russel</p> <p>5 Emanuel or whether he gets paid for his</p> <p>6 version of the song.</p> <p>7 My question was: Do you know</p> <p>8 whether any of the plaintiffs' money</p> <p>9 was diverted to Russel Emanuel on that</p> <p>10 song? It's a sole question --</p> <p>11 MR. MARDEROSIAN: Just going</p> <p>12 to object.</p> <p>13 Q -- by virtue of the change in</p> <p>14 title?</p> <p>15 MR. MARDEROSIAN: It's vague</p> <p>16 and overbroad and an incomplete</p> <p>17 hypothetical.</p> <p>18 Q Yes or no?</p> <p>19 A I have to give it some</p> <p>20 thought in the context of what I was</p> <p>21 discussing earlier.</p> <p>22 Q I can wait.</p> <p>23 A It may take more thought than</p> <p>24 that.</p> <p>25 Q Well, if you don't know, you</p>	<p style="text-align: right;">Page 289</p> <p>1 KOHN</p> <p>2 A Right.</p> <p>3 Q I've gone through this.</p> <p>4 Page 42 you refer to Uphill</p> <p>5 Battling in the second paragraph.</p> <p>6 A Right.</p> <p>7 Q Do you see that?</p> <p>8 A The boys had entitled a song</p> <p>9 called The Silence.</p> <p>10 Q And now it's Uphill Battle.</p> <p>11 A The song was changed to</p> <p>12 Uphill Battle. There's a song</p> <p>13 registered at ASCAP called Uphill</p> <p>14 Battles. The song published by</p> <p>15 Directors Cuts. And it was cowritten</p> <p>16 by Bruce Fingers, which one of</p> <p>17 Emanuel's alias.</p> <p>18 Q The question is the same.</p> <p>19 A The question is the same. Do</p> <p>20 I know --</p> <p>21 Q Yes.</p> <p>22 A -- whether this</p> <p>23 specifically --</p> <p>24 Q There was any money diverted</p> <p>25 for that change in title?</p>

<p style="text-align: right;">Page 290</p> <p>1 KOHN</p> <p>2 A No.</p> <p>3 MR. MARDEROSIAN: Diverted in</p> <p>4 the Russel Emanuel's pocket?</p> <p>5 MR. ZAKARIN: Yes. Either</p> <p>6 Russel Emanuel or to that song,</p> <p>7 whether it went into Russel</p> <p>8 Emanuel's pocket or somebody else.</p> <p>9 MR. MARDEROSIAN: Well, Aron</p> <p>10 and Robert didn't get paid.</p> <p>11 MR. ZAKARIN: No, we haven't</p> <p>12 established that. We've just</p> <p>13 talking about titles here.</p> <p>14 And I'm asking whether that</p> <p>15 change in title resulted in --</p> <p>16 that you know of in any diversion</p> <p>17 of income to the Russel Emanuel</p> <p>18 version. That's all.</p> <p>19 MR. MARDEROSIAN: For the</p> <p>20 record -- hold on.</p> <p>21 I object. It's vague. It's</p> <p>22 an incomplete hypothetical.</p> <p>23 Q You can answer the question.</p> <p>24 A So I'm focusing on the word</p> <p>25 result. Did it result from, because I</p>	<p style="text-align: right;">Page 292</p> <p>1 KOHN</p> <p>2 Q Yes.</p> <p>3 A -- in money going from the</p> <p>4 guys to this. No.</p> <p>5 My point here was to show</p> <p>6 that titles were changed --</p> <p>7 Q I know.</p> <p>8 A -- in a very suspicious way.</p> <p>9 But, you know, I don't have any.</p> <p>10 Q If I asked you about the next</p> <p>11 couple of songs, which is Big Guns --</p> <p>12 A Guns. Glock Sucker.</p> <p>13 Q Glock Sucker.</p> <p>14 Is your answer the same that</p> <p>15 it would -- you have no evidence that</p> <p>16 money was diverted as a result of these</p> <p>17 title changes?</p> <p>18 MR. MARDEROSIAN: I'm just</p> <p>19 going to object.</p> <p>20 It calls for a legal opinion</p> <p>21 and conclusion.</p> <p>22 MR. ZAKARIN: It's factual.</p> <p>23 MR. MARDEROSIAN: It's vague</p> <p>24 and is an incomplete hypothetical.</p> <p>25 Q You can answer the question.</p>
<p style="text-align: right;">Page 291</p> <p>1 KOHN</p> <p>2 don't want that to be construed --</p> <p>3 Q Did it happen? Do you have</p> <p>4 any knowledge that it happened?</p> <p>5 A I don't want that to be</p> <p>6 construed that I -- because I do think</p> <p>7 because of the way, as I described</p> <p>8 earlier, this has been set up to</p> <p>9 allocate synchronization income and</p> <p>10 direct public performance licenses</p> <p>11 through Extreme, and money is being</p> <p>12 allocated on the basis of the number of</p> <p>13 songs as opposed to usage, money would</p> <p>14 be funneling -- be funneled to the</p> <p>15 Extreme's CEO.</p> <p>16 But you're asking me a</p> <p>17 different question.</p> <p>18 Q But I'll make that easier for</p> <p>19 you.</p> <p>20 A No, but -- no, no, no. Let</p> <p>21 me just -- so you're asking me a</p> <p>22 different question, which is does the</p> <p>23 change in title -- do I have any</p> <p>24 information that the change in title</p> <p>25 here resulted --</p>	<p style="text-align: right;">Page 293</p> <p>1 KOHN</p> <p>2 A Yeah, I don't have any</p> <p>3 personal knowledge of any of that.</p> <p>4 Q Okay. Okay. And by the way,</p> <p>5 I will say I'm not including in that so</p> <p>6 we're clear. So your caveat before is</p> <p>7 clear, the -- your methodology of</p> <p>8 allocation that you think is proper and</p> <p>9 how that may or may have not affected</p> <p>10 on blanket licenses, I'm not dealing</p> <p>11 with that.</p> <p>12 A I appreciate you saying that</p> <p>13 because I was -- earlier I was --</p> <p>14 Q You've made your point.</p> <p>15 A I wanted to make sure I</p> <p>16 wasn't confusing the two things.</p> <p>17 Q No. You've made your point.</p> <p>18 And we can disagree, but that's your</p> <p>19 point.</p> <p>20 I think from what you've said</p> <p>21 before, and I want to make sure that</p> <p>22 this is correct, and it may not be part</p> <p>23 of your opinion. You haven't</p> <p>24 identified any money that was paid to</p> <p>25 Russel Emanuel that should have been</p>

<p style="text-align: right;">Page 294</p> <p>1 KOHN</p> <p>2 paid to the plaintiffs putting to the</p> <p>3 side your allocation theory; is that</p> <p>4 correct?</p> <p>5 MR. MARDEROSIAN: I'm just</p> <p>6 going to object.</p> <p>7 That's vague and an</p> <p>8 incomplete hypothetical.</p> <p>9 A I think that if I did a</p> <p>10 further review of the tremendous amount</p> <p>11 of information that I've been provided</p> <p>12 with that I might have the evidence and</p> <p>13 I might have seen the evidence, but</p> <p>14 you're trying to sort of say other than</p> <p>15 that. I won't -- I won't agree to</p> <p>16 that.</p> <p>17 You follow me?</p> <p>18 Q You won't agree to that</p> <p>19 because you can't speak to the</p> <p>20 evidence --</p> <p>21 A Because there's so much</p> <p>22 evidence --</p> <p>23 COURT REPORTER: I --</p> <p>24 Q You're right. I'm sorry.</p> <p>25 That was his fault though.</p>	<p style="text-align: right;">Page 296</p> <p>1 KOHN</p> <p>2 MR. ZAKARIN: I have a</p> <p>3 concern right now. My concern is</p> <p>4 the witness has said a couple of</p> <p>5 times that he's not thinking</p> <p>6 clearly. And I understand. And</p> <p>7 you have vertigo. I have a</p> <p>8 concern about -- because I've got</p> <p>9 a lot more to do and I don't want</p> <p>10 to have a statement or a concern</p> <p>11 that the witness's testimony is</p> <p>12 the product of impairment, lack of</p> <p>13 physical, you know, fortitude,</p> <p>14 being unwell. I'm very concerned</p> <p>15 about it.</p> <p>16 MR. MARDEROSIAN: Here's the</p> <p>17 only alternative to that. He's</p> <p>18 going to have to come out to Los</p> <p>19 Angeles if that's the case and</p> <p>20 we'll add another day out in Los</p> <p>21 Angeles if that's the case.</p> <p>22 MR. ZAKARIN: I don't know</p> <p>23 what else to do here because I've</p> <p>24 got hours.</p> <p>25 MR. MARDEROSIAN: I</p>
<p style="text-align: right;">Page 295</p> <p>1 KOHN</p> <p>2 A There's so much evidence. I</p> <p>3 just don't want to be misrepresented or</p> <p>4 kind of what I say be misconstrued.</p> <p>5 Okay?</p> <p>6 Q Am I correct --</p> <p>7 A Because I very well may have,</p> <p>8 at this point in time I'm not thinking</p> <p>9 clearly, but I may well have other</p> <p>10 evidence that I've seen that I have not</p> <p>11 brought to light. But I appreciate</p> <p>12 what you're trying to do. You're</p> <p>13 trying to say other than what I said</p> <p>14 earlier. All right?</p> <p>15 But when you say that I also</p> <p>16 put a caveat on what I said earlier as</p> <p>17 being something that I would want to</p> <p>18 supplement with everything that I have</p> <p>19 looked at and everything that I've said</p> <p>20 before. It's a -- it's a rhetorical</p> <p>21 trick that I don't want to get caught</p> <p>22 up in.</p> <p>23 You follow me?</p> <p>24 Q I'm -- let's -- do you want</p> <p>25 to --</p>	<p style="text-align: right;">Page 297</p> <p>1 KOHN</p> <p>2 understand. And you don't want</p> <p>3 the record to be jeopardized or</p> <p>4 have me claim that something that</p> <p>5 he said wasn't valid because he</p> <p>6 wasn't feeling well. I have been</p> <p>7 there and I understand that.</p> <p>8 I do want to say this, too,</p> <p>9 Don. When you use terms like</p> <p>10 evidence, that's calling for a</p> <p>11 legal opinion and conclusion</p> <p>12 because there could be direct and</p> <p>13 circumstantial evidence. And we</p> <p>14 know that circumstantial evidence</p> <p>15 has the same effect as direct</p> <p>16 evidence. So asking an expert</p> <p>17 who's not a legal expert in this</p> <p>18 case if there's evidence is kind</p> <p>19 of a waste of time. And I know</p> <p>20 that you know that.</p> <p>21 So that -- those types of</p> <p>22 questions are eating our time up,</p> <p>23 as well. Let me -- let me do</p> <p>24 this. Let me take a quick break</p> <p>25 and talk to him and if he's not</p>

75 (Pages 294 - 297)

<p style="text-align: right;">Page 310</p> <p>1 KOHN</p> <p>2 MR. MARDEROSIAN: I have to</p> <p>3 make objections if the questions</p> <p>4 aren't proper questions.</p> <p>5 Q On Page 9, in the middle of</p> <p>6 the page, it says, music publishers</p> <p>7 where they can have influence over the</p> <p>8 titles of songs will customarily</p> <p>9 attempt to avoid duplicate titles to</p> <p>10 avoid the obvious problem of</p> <p>11 misdirected or suspended public</p> <p>12 performance revenues.</p> <p>13 Do you see that statement?</p> <p>14 A You said page 9.</p> <p>15 Q Page 9 of your report?</p> <p>16 A Music publishers where they</p> <p>17 can have influence?</p> <p>18 Q Yes, that statement. Do you</p> <p>19 see that?</p> <p>20 A I'm reading it again. Yes.</p> <p>21 Q Is it your testimony that</p> <p>22 this is another custom and practice in</p> <p>23 the industry?</p> <p>24 A I am aware over many yours</p> <p>25 that one of the problems that the</p>	<p style="text-align: right;">Page 312</p> <p>1 KOHN</p> <p>2 not copyrightable?</p> <p>3 A It doesn't mean they're that</p> <p>4 not protectable. There is the Thomson</p> <p>5 versus Walt Disney case in California</p> <p>6 where unfair competition or palming</p> <p>7 off -- the Lovebug case in which a</p> <p>8 California court held that under unfair</p> <p>9 competition law or palming off the</p> <p>10 titles could be protectable as in the</p> <p>11 form of a trademark under unfair</p> <p>12 competition but not copyrightable.</p> <p>13 Q Yes, I know that.</p> <p>14 Have you either spoken with</p> <p>15 or surveyed any music publishers that</p> <p>16 told you that they will customarily</p> <p>17 change titles to avoid duplicates?</p> <p>18 A I think -- I don't know</p> <p>19 whether it was music publishers that I</p> <p>20 learned the problem from or people in</p> <p>21 the -- PROs. But in discussions that</p> <p>22 I've had over 35 years, I've come to be</p> <p>23 aware that duplicate titles have been a</p> <p>24 problem and it would be good if we</p> <p>25 could try to avoid them where possible.</p>
<p style="text-align: right;">Page 311</p> <p>1 KOHN</p> <p>2 industry faces in allocating income,</p> <p>3 particularly blanket income, was the</p> <p>4 problem of duplicate titles. And there</p> <p>5 have been lots of ways that performance</p> <p>6 societies and others have tried to deal</p> <p>7 with that problem. So I'm aware that</p> <p>8 it's a problem and that -- I'm aware</p> <p>9 that there are publishers who try to</p> <p>10 avoid duplicate titles where they can.</p> <p>11 It's not always up to them.</p> <p>12 So I would say that it's a</p> <p>13 custom and practice in the industry to</p> <p>14 avoid duplicates where practical.</p> <p>15 Sometimes it's the songwriter. He's</p> <p>16 going to do what he wants to do. There</p> <p>17 are publishers who have always insisted</p> <p>18 that the first three words of the song</p> <p>19 is going to be the title. There was</p> <p>20 this guy Jerome, I don't know, Robbins</p> <p>21 of Robbin's Music. So each publisher</p> <p>22 has its own, sometimes, quirkiness. As</p> <p>23 metadata improves over time, that may</p> <p>24 not be a problem anymore.</p> <p>25 Q You're aware that titles are</p>	<p style="text-align: right;">Page 313</p> <p>1 KOHN</p> <p>2 Q You're aware that the PROs</p> <p>3 have thousands of songs that have the</p> <p>4 same title?</p> <p>5 A Yes.</p> <p>6 Q Did you ask any of the PROs</p> <p>7 whether those thousands of common</p> <p>8 titles present an obvious problem for</p> <p>9 them in allocating income?</p> <p>10 A I have -- since the beginning</p> <p>11 of this case, no.</p> <p>12 Q Did you ask them before the</p> <p>13 beginning of this case?</p> <p>14 A I might have been on panels</p> <p>15 that might have talked -- that's</p> <p>16 probably -- may have been where I have</p> <p>17 heard that it is a common problem or it</p> <p>18 was a common problem 20 years ago</p> <p>19 before the automation of cue sheets</p> <p>20 through RapidCue and other kinds of</p> <p>21 systems. Things change over time.</p> <p>22 MR. MARDEROSIAN: Don, you</p> <p>23 are aware your own expert, Adam</p> <p>24 Taylor, says his company does not</p> <p>25 change titles, right? Was that</p>

<p style="text-align: right;">Page 314</p> <p>1 KOHN</p> <p>2 included in your question of</p> <p>3 evidence?</p> <p>4 MR. ZAKARIN: I'm fully aware</p> <p>5 of it. Adam Taylor, they don't</p> <p>6 change duplicators either.</p> <p>7 MR. MARDEROSIAN: Yeah, they</p> <p>8 don't change titles.</p> <p>9 MR. ZAKARIN: They don't</p> <p>10 change duplicates.</p> <p>11 MR. MARDEROSIAN: I think the</p> <p>12 specific phrase in his report is</p> <p>13 his company does not change</p> <p>14 titles.</p> <p>15 MR. ZAKARIN: Yes.</p> <p>16 MR. MARDEROSIAN: At all.</p> <p>17 MR. ZAKARIN: And it's</p> <p>18 explained.</p> <p>19 MR. MARDEROSIAN: I just want</p> <p>20 to make sure that that was</p> <p>21 included.</p> <p>22 MR. ZAKARIN: It's explained</p> <p>23 why.</p> <p>24 A I read Adam's report, and I</p> <p>25 remember him saying that.</p>	<p style="text-align: right;">Page 316</p> <p>1 KOHN</p> <p>2 A I don't remember that</p> <p>3 specifically, but...</p> <p>4 Q Now if duplicate titles is,</p> <p>5 as you say in your opinion, an obvious</p> <p>6 problem, do you have any understanding</p> <p>7 as to why BMI or ASCAP or the major</p> <p>8 publishers have not done something to</p> <p>9 eliminate this problem over the past 75</p> <p>10 years?</p> <p>11 A I would -- I would say that</p> <p>12 they're not necessarily in the position</p> <p>13 to eliminate it. They're not in</p> <p>14 control of who registers what titles or</p> <p>15 not. And they are finding other ways</p> <p>16 to deal with the problem.</p> <p>17 Q To be clear it's not your</p> <p>18 testimony, is it, that having</p> <p>19 identically titled songs automatically</p> <p>20 creates confusion and results in a loss</p> <p>21 of performance income?</p> <p>22 A Not automatically.</p> <p>23 Q It can happen?</p> <p>24 A Yes.</p> <p>25 Q But it's not something that</p>
<p style="text-align: right;">Page 315</p> <p>1 KOHN</p> <p>2 Q I'm well aware of Adam's</p> <p>3 report as well.</p> <p>4 And you're also aware that</p> <p>5 publishers like Warner Chappell, BMI,</p> <p>6 UMPG, Sony ATV, just by way of example,</p> <p>7 have multiple songs in their catalogs</p> <p>8 with the same titles?</p> <p>9 MR. MARDEROSIAN: Objection.</p> <p>10 Vague. Overbroad.</p> <p>11 Incomplete hypothetical.</p> <p>12 Assumes facts not in</p> <p>13 evidence.</p> <p>14 A I trust that they do since</p> <p>15 there are so many duplicate titles at</p> <p>16 the PROs that they could be from the</p> <p>17 same music publishing company.</p> <p>18 Q And you read Adam Taylor's</p> <p>19 report. You said that?</p> <p>20 A Yes.</p> <p>21 Q So by way of example I think</p> <p>22 Adam Taylor's report reflects that APM</p> <p>23 has four titles of Mulholland Drive,</p> <p>24 separate songs in its own catalog.</p> <p>25 Do you recall that?</p>	<p style="text-align: right;">Page 317</p> <p>1 KOHN</p> <p>2 is caused automatically by duplicate</p> <p>3 titles?</p> <p>4 A Well, it could be caused --</p> <p>5 well, it could be caused automatically</p> <p>6 by a specific duplicate title but not</p> <p>7 in general.</p> <p>8 Q Have you had any</p> <p>9 communication with any PRO regarding</p> <p>10 the error rates on cue sheets that they</p> <p>11 receive from either producers of</p> <p>12 programming or broadcasters?</p> <p>13 A No.</p> <p>14 Q Do you have any knowledge on</p> <p>15 your own as to what the error rate is</p> <p>16 for ASCAP or BMI on the cue sheets they</p> <p>17 get?</p> <p>18 A No.</p> <p>19 Q You understand, don't you,</p> <p>20 that cue sheets are created one way or</p> <p>21 another by music supervisors or other</p> <p>22 people at either broadcasters or</p> <p>23 programs?</p> <p>24 MR. MARDEROSIAN: I'm going</p> <p>25 to object. Excuse me. I'm going</p>

80 (Pages 314 - 317)

<p style="text-align: right;">Page 318</p> <p>1 KOHN</p> <p>2 to object.</p> <p>3 That assumes facts not in</p> <p>4 evidence. Vague and overbroad.</p> <p>5 Incomplete hypothetical.</p> <p>6 As to what is meant by</p> <p>7 prepared, it's vague.</p> <p>8 Q You can answer.</p> <p>9 A My understanding is that</p> <p>10 they're largely generated by</p> <p>11 broadcasters and producers based on</p> <p>12 information that they have sometimes</p> <p>13 from the publishers themselves.</p> <p>14 Q And you acknowledge, don't</p> <p>15 you, that there is the possibility of</p> <p>16 human error in the creation of cue</p> <p>17 sheets?</p> <p>18 MR. MARDEROSIAN: I'm just</p> <p>19 going to object.</p> <p>20 It's argumentative. It's</p> <p>21 vague. And overbroad.</p> <p>22 Q You can answer.</p> <p>23 A Yes, but I would think with</p> <p>24 increasing automation the human error</p> <p>25 might be less than it was in the past.</p>	<p style="text-align: right;">Page 320</p> <p>1 KOHN</p> <p>2 something that -- I've never used it.</p> <p>3 I've never input into RapidCue. But I</p> <p>4 understand it get automatically</p> <p>5 generated to ASCAP and BMI and</p> <p>6 presumably the other performance rights</p> <p>7 societies. I'm not sure.</p> <p>8 Q Do you know how information</p> <p>9 is input into RapidCue by the</p> <p>10 broadcaster or the programmer?</p> <p>11 A I just said I don't.</p> <p>12 Q Okay.</p> <p>13 A Yeah.</p> <p>14 Q Are you aware that the PROs</p> <p>15 have large bodies of employees who</p> <p>16 actually receive and review cue sheets?</p> <p>17 MR. MARDEROSIAN: I'll just</p> <p>18 object.</p> <p>19 It assumes facts not in</p> <p>20 evidence. Vague and overbroad.</p> <p>21 Calls for speculation.</p> <p>22 A Receive is one word and</p> <p>23 review is another. That's a compound</p> <p>24 question.</p> <p>25 I certainly would be aware</p>
<p style="text-align: right;">Page 319</p> <p>1 KOHN</p> <p>2 Q Well, the automation still</p> <p>3 requires information being inputted,</p> <p>4 doesn't it?</p> <p>5 MR. MARDEROSIAN: I'm just</p> <p>6 going to object.</p> <p>7 This is vague and overbroad.</p> <p>8 Incomplete hypothetical. Calls</p> <p>9 for speculation.</p> <p>10 Q You can answer.</p> <p>11 A But information could be</p> <p>12 automatically generated from somebody's</p> <p>13 metadata. So if the publisher provides</p> <p>14 metadata, it's the old expression</p> <p>15 garbage in garbage out. So you can</p> <p>16 have an automated system that's</p> <p>17 reproducing an error made by someone</p> <p>18 that may not be an error, that may be</p> <p>19 an intentional act.</p> <p>20 Q Do you know how each</p> <p>21 broadcaster that has a license with</p> <p>22 either BMI or ASCAP goes about filling</p> <p>23 out and filing cue sheets, the process?</p> <p>24 A I know -- I know of the</p> <p>25 system called RapidCue which is</p>	<p style="text-align: right;">Page 321</p> <p>1 KOHN</p> <p>2 that they have people and staffs who</p> <p>3 receive them. I'm not -- personal</p> <p>4 knowledge of how they may review them</p> <p>5 or not review them.</p> <p>6 Q So you have no knowledge one</p> <p>7 way or the another whether the PROs</p> <p>8 review the cue sheets that they get and</p> <p>9 if there's erroneous information or</p> <p>10 incomplete information, how they deal</p> <p>11 with it?</p> <p>12 A I have no personal knowledge</p> <p>13 of how cue sheets are received other</p> <p>14 than electronically, you know, and</p> <p>15 reviewed and handled by PROs. I have</p> <p>16 not worked in the PRO. I don't know.</p> <p>17 Q So that's not part of your</p> <p>18 knowledge as to how the PROs function?</p> <p>19 A Well, generally it's part of</p> <p>20 my knowledge of how they function. I</p> <p>21 know they receive cue sheets from</p> <p>22 RapidCue. I don't think that's</p> <p>23 generally known by a lot of people.</p> <p>24 Q They also receive cue sheets</p> <p>25 that are paper cue sheets or Excel</p>

<p style="text-align: right;">Page 322</p> <p>1 KOHN</p> <p>2 spreadsheets from broadcasters and</p> <p>3 program suppliers, don't they?</p> <p>4 A Yes.</p> <p>5 Q And indeed you've looked at a</p> <p>6 lot of the cue sheets that they</p> <p>7 received?</p> <p>8 A That's correct.</p> <p>9 Q By the way, I may have asked</p> <p>10 this and I apologize, did you look at</p> <p>11 all of the cue sheets that were -- that</p> <p>12 BMI produced?</p> <p>13 A No.</p> <p>14 Q You only looked at some?</p> <p>15 A Some.</p> <p>16 Q Did you have access to all of</p> <p>17 them?</p> <p>18 A I think they were all sent to</p> <p>19 me, yes.</p> <p>20 Q Did anybody -- strike that.</p> <p>21 I won't do it.</p> <p>22 Have you ever suggested to a</p> <p>23 music publisher that they perhaps</p> <p>24 consider changing titles to avoid</p> <p>25 duplicates?</p>	<p style="text-align: right;">Page 324</p> <p>1 KOHN</p> <p>2 the music industry over time a problem.</p> <p>3 Q Do you have any understanding</p> <p>4 of any -- strike that.</p> <p>5 Do you have any understanding</p> <p>6 that BMI, ASCAP or SESAC cannot</p> <p>7 properly allocate performance income</p> <p>8 among identically titled songs?</p> <p>9 A Say that again please.</p> <p>10 Q Sure.</p> <p>11 Do you have any understanding</p> <p>12 or any knowledge that the PROs cannot</p> <p>13 properly allocate performance income</p> <p>14 among identically titled songs?</p> <p>15 MR. MARDEROSIAN: I'm going</p> <p>16 to object. That assumes facts not</p> <p>17 in evidence.</p> <p>18 Vague and overbroad.</p> <p>19 Incomplete hypothetical.</p> <p>20 A My general understanding is</p> <p>21 that they will go by the entire set of</p> <p>22 metadata, such as the songwriter names</p> <p>23 and will be able to distinguish between</p> <p>24 songs that have duplicate titles by</p> <p>25 other fields in the metadata such as</p>
<p style="text-align: right;">Page 323</p> <p>1 KOHN</p> <p>2 A Well, I had a discussion with</p> <p>3 my father about it with respect to the</p> <p>4 story I told you earlier about Robbins</p> <p>5 Music in the early days consisting --</p> <p>6 like a song like I'm In the Mood For</p> <p>7 Love, the first three words of the song</p> <p>8 is I'm In the Mood for Love, and</p> <p>9 Robins -- the head of Robins Music</p> <p>10 could care less what the songwriter</p> <p>11 thought. That's what the title was</p> <p>12 going to be, the first three words of</p> <p>13 it.</p> <p>14 So we talked about that. And</p> <p>15 we did talk about the notion -- I</p> <p>16 remember having this conversation with</p> <p>17 my father about duplicate titles and</p> <p>18 how is that all dealt with. Because</p> <p>19 I've seen duplicate titles before. And</p> <p>20 he was a music publisher at the time.</p> <p>21 So I have to answer yes, but I do not</p> <p>22 recall any specific other instances</p> <p>23 where I might have had specific</p> <p>24 discussions with anybody. I just knew</p> <p>25 generally that people considered it in</p>	<p style="text-align: right;">Page 325</p> <p>1 KOHN</p> <p>2 the composer's names and the</p> <p>3 publisher's name, et cetera.</p> <p>4 I want to supplement a prior</p> <p>5 answer before I forget. And that is</p> <p>6 you've been asking me questions about</p> <p>7 whether monies could be diverted to the</p> <p>8 wrong songwriter or diverted to the</p> <p>9 wrong publisher as a result of</p> <p>10 duplicate titles. But the other side</p> <p>11 of the --</p> <p>12 Q That wasn't quite my</p> <p>13 question, but it's okay.</p> <p>14 A Okay.</p> <p>15 Q My question was more</p> <p>16 specific.</p> <p>17 A Okay.</p> <p>18 MR. MARDEROSIAN: Go ahead.</p> <p>19 Q You can go ahead.</p> <p>20 A Right.</p> <p>21 There's also another aspect</p> <p>22 here is that if someone is calling up</p> <p>23 and they know a song that they've heard</p> <p>24 and they somehow learned the title of</p> <p>25 the work, let's say it's Uphill</p>

<p style="text-align: right;">Page 334</p> <p>1 KOHN</p> <p>2 that you -- you stepped over the</p> <p>3 line when you produced something</p> <p>4 like that, but you did.</p> <p>5 MR. ZAKARIN: You have no</p> <p>6 comprehension of what you're</p> <p>7 talking about.</p> <p>8 MR. MARDEROSIAN: I have</p> <p>9 plenty of comprehension.</p> <p>10 MR. ZAKARIN: I agree. You</p> <p>11 do.</p> <p>12 MR. MARDEROSIAN: And it's</p> <p>13 going to be used to defeat your</p> <p>14 motion. Really? I mean, think</p> <p>15 about it, Don.</p> <p>16 MR. ZAKARIN: There's no</p> <p>17 graveyard near here, Mick, so you</p> <p>18 don't have to whistle.</p> <p>19 MR. MARDEROSIAN: Just stop</p> <p>20 arguing with the witness. Stop</p> <p>21 trying to elicit legal opinions</p> <p>22 and conclusions so we can get</p> <p>23 through this.</p> <p>24 MR. ZAKARIN: You can stop it</p> <p>25 at any point and show it to the</p>	<p style="text-align: right;">Page 336</p> <p>1 KOHN</p> <p>2 changing song titles. I think he led</p> <p>3 me to believe that it looked like he</p> <p>4 was changing Rob and Aron's song</p> <p>5 titles. What other song titles could</p> <p>6 he have been discussing during his</p> <p>7 deposition other than Aron and Rob's</p> <p>8 songs.</p> <p>9 So you have him changing song</p> <p>10 titles. He was asked why do you do</p> <p>11 that? He says he did it for marketing</p> <p>12 reasons, which is inconsistent with the</p> <p>13 answer that Dan Pounder had given,</p> <p>14 which is inconsistent with what Rob and</p> <p>15 Aron were told by Viacom's employee</p> <p>16 or -- who said specifically in an</p> <p>17 e-mail that the titles would be changed</p> <p>18 for the purpose of avoiding duplicates.</p> <p>19 And just the opposite had happened.</p> <p>20 And it looks like the CEO was doing it.</p> <p>21 And what I'm suggesting is</p> <p>22 that there's plenty of circumstantial</p> <p>23 evidence in the record that shows that</p> <p>24 it was being done for the purpose of</p> <p>25 diverting revenues to the song tiles</p>
<p style="text-align: right;">Page 335</p> <p>1 KOHN</p> <p>2 judge if you think that I'm asking</p> <p>3 improper questions.</p> <p>4 Let's go back to my question.</p> <p>5 Please read it back because it</p> <p>6 was -- it followed his answer and</p> <p>7 I want my question.</p> <p>8 (Whereupon, the record was</p> <p>9 read.)</p> <p>10 Q Do you have knowledge of the</p> <p>11 facts or evidence that anybody called</p> <p>12 Upstream and asked for one of Aron and</p> <p>13 Robert's songs and were instead</p> <p>14 misdirected to somebody else's song.</p> <p>15 That was the question. You identified</p> <p>16 that as a possibility.</p> <p>17 So my question is, do you</p> <p>18 know if that ever happened?</p> <p>19 MR. MARDEROSIAN: Objection.</p> <p>20 Calls for a legal opinion and</p> <p>21 conclusion.</p> <p>22 Incomplete hypothetical.</p> <p>23 A You asked me if I had any</p> <p>24 evidence, and the evidence is that we</p> <p>25 know that Russ Emanuel has admitted to</p>	<p style="text-align: right;">Page 337</p> <p>1 KOHN</p> <p>2 that were registered by the CEO under</p> <p>3 his own name.</p> <p>4 Q Now, let's deal with my</p> <p>5 question.</p> <p>6 A That is the answer to your</p> <p>7 question. That is evidence.</p> <p>8 MR. MARDEROSIAN: Hold on.</p> <p>9 We're arguing again.</p> <p>10 Please, question and answer.</p> <p>11 No argument in between.</p> <p>12 Q I asked you a very specific</p> <p>13 question: Do you know of anybody that</p> <p>14 called Extreme and asked for Rob and</p> <p>15 Aron's title and were instead</p> <p>16 misdirected to a different title?</p> <p>17 A Of course not.</p> <p>18 Q Thank you.</p> <p>19 A And nor do I know of</p> <p>20 anyone -- whether someone at Extreme</p> <p>21 had any outbound phone calls selling</p> <p>22 them on songs that should have been Rob</p> <p>23 and Aron's song when people were</p> <p>24 looking for a song.</p> <p>25 Q You have no knowledge of</p>

<p style="text-align: right;">Page 338</p> <p>1 KOHN</p> <p>2 either one?</p> <p>3 A I don't have any personal</p> <p>4 knowledge of phone calls.</p> <p>5 Q Okay.</p> <p>6 That's all we needed.</p> <p>7 A Well, I think we have all we</p> <p>8 need here.</p> <p>9 (Whereupon, a brief recess</p> <p>10 was taken.)</p> <p>11 Q Let's mark as Exhibit K5 --</p> <p>12 MR. MARDEROSIAN: Anyone</p> <p>13 would know that an audio is</p> <p>14 completely useless.</p> <p>15 MR. BAGLEY: Don't tell me</p> <p>16 what anyone would know, Mick.</p> <p>17 MR. MARDEROSIAN: I'm sorry.</p> <p>18 But, I mean, you -- you say those</p> <p>19 things like you're trying to argue</p> <p>20 the case, and I just have to</p> <p>21 respond how ridiculous it is --</p> <p>22 how ridiculous it is.</p> <p>23 MR. BAGLEY: Argue the case?</p> <p>24 MR. ZAKARIN: Stop it. Both</p> <p>25 of you because we want to get this</p>	<p style="text-align: right;">Page 340</p> <p>1 KOHN</p> <p>2 Q Have you read any of these</p> <p>3 license agreements between BMI and the</p> <p>4 broadcasters?</p> <p>5 A Yes, I did. Except where</p> <p>6 there was a redaction, I didn't.</p> <p>7 Q Well, you read it; but you</p> <p>8 didn't see what was there?</p> <p>9 A Right.</p> <p>10 Q Before this case, had you</p> <p>11 ever seen any licenses between a</p> <p>12 broadcaster and a PRO?</p> <p>13 A I might have one in my book</p> <p>14 or several in my book. Yes. The</p> <p>15 answer is yes.</p> <p>16 Q These are blanket licenses,</p> <p>17 these licenses?</p> <p>18 A Yes.</p> <p>19 Q You're familiar with PRO</p> <p>20 blanket licenses?</p> <p>21 A Yes.</p> <p>22 Q And you're familiar with the</p> <p>23 fact that they're based upon a</p> <p>24 percentage of the broadcaster's</p> <p>25 revenue?</p>
<p style="text-align: right;">Page 339</p> <p>1 KOHN</p> <p>2 deposition done.</p> <p>3 If you want to do this, I'm</p> <p>4 telling you that we will go</p> <p>5 straight into Massarsky's</p> <p>6 deposition tomorrow at 9:00.</p> <p>7 This is going to be K5.</p> <p>8 (Document entitled, Turner -</p> <p>9 BMI Music Performance License</p> <p>10 Agreement, was marked K Exhibit 5,</p> <p>11 for identification, as of this</p> <p>12 date.)</p> <p>13 Q Mr. Kohn, you attended</p> <p>14 Allison Smith's deposition, right?</p> <p>15 A Yes.</p> <p>16 Q And you remember, these are</p> <p>17 exhibits for her deposition 12 through</p> <p>18 15. And these are contracts between</p> <p>19 BMI and various broadcasters.</p> <p>20 Do you recall that?</p> <p>21 A Yes.</p> <p>22 MR. MARDEROSIAN: This is K</p> <p>23 what, Don?</p> <p>24 MR. ZAKARIN: K5.</p> <p>25 MR. MARDEROSIAN: Thank you.</p>	<p style="text-align: right;">Page 341</p> <p>1 KOHN</p> <p>2 A Yes.</p> <p>3 Q And you're also familiar --</p> <p>4 turn to Page 14, the first one. We'll</p> <p>5 just deal with the first one, which is</p> <p>6 Turner.</p> <p>7 This is one of the exhibits.</p> <p>8 It identifies the information to be</p> <p>9 contained in a cue sheet in paragraph,</p> <p>10 I think, 6A, doesn't it?</p> <p>11 A Yes.</p> <p>12 Q And the information is not</p> <p>13 nearly this long title. It's a number</p> <p>14 of other items, correct?</p> <p>15 A Yes.</p> <p>16 Q It includes, by way of</p> <p>17 example, writer, composer, publisher,</p> <p>18 nature and type of use, manner of</p> <p>19 performance, duration of performance</p> <p>20 and the relevant PRO, correct?</p> <p>21 A Yes.</p> <p>22 Q So that's a number of items.</p> <p>23 And it's correct, isn't it,</p> <p>24 that the publisher doesn't supply all</p> <p>25 of that quote/unquote metadata, does</p>

<p style="text-align: right;">Page 342</p> <p>1 KOHN</p> <p>2 it?</p> <p>3 A Correct.</p> <p>4 Q By way of example the</p> <p>5 publisher doesn't provide the nature</p> <p>6 and type of use, does it?</p> <p>7 A Well, that might be in the</p> <p>8 sync license, right? I'm not sure</p> <p>9 whether the sync license would end up</p> <p>10 in metadata, no.</p> <p>11 Q Doesn't include the manner of</p> <p>12 performance, doesn't come from the</p> <p>13 publisher?</p> <p>14 A Well, it certainly wouldn't</p> <p>15 include -- it wouldn't include the</p> <p>16 episode name for example, right?</p> <p>17 MR. MARDEROSIAN: Don't guess</p> <p>18 or speculate.</p> <p>19 Q Doesn't include the duration</p> <p>20 of performance either, does it? These</p> <p>21 are all broadcaster pieces of</p> <p>22 information.</p> <p>23 A Right. Exactly.</p> <p>24 Q So cue sheets are not merely</p> <p>25 the publisher-supplied metadata,</p>	<p style="text-align: right;">Page 344</p> <p>1 KOHN</p> <p>2 said in her deposition. If it's there,</p> <p>3 it's there.</p> <p>4 Q Page 9 also you have a</p> <p>5 statement as follows -- it's the third</p> <p>6 from the bullet point, I think: The</p> <p>7 evidence suggests -- the evidence</p> <p>8 suggests that the information provided</p> <p>9 by the Extreme defendants to</p> <p>10 broadcasters and program producers was</p> <p>11 not accurate as many cue sheets reflect</p> <p>12 inaccurate information.</p> <p>13 Do you see that?</p> <p>14 A Yes.</p> <p>15 Q And when you're talking about</p> <p>16 many cue sheets, I think -- can you</p> <p>17 tell me if you've identified more than</p> <p>18 five or six that have inaccurate</p> <p>19 information?</p> <p>20 A I saw a number of them.</p> <p>21 Q Is the number between one and</p> <p>22 ten that had inaccurate information?</p> <p>23 A That may be where I stopped,</p> <p>24 yeah.</p> <p>25 Q And that's out of the -- how</p>
<p style="text-align: right;">Page 343</p> <p>1 KOHN</p> <p>2 there's other pieces of information</p> <p>3 that the PRO requires that could come</p> <p>4 only from the program supplier or the</p> <p>5 broadcaster, correct?</p> <p>6 A Correct.</p> <p>7 MR. MARDEROSIAN: I'm going</p> <p>8 to object. It calls for</p> <p>9 speculation.</p> <p>10 Vague and overbroad.</p> <p>11 Incomplete hypothetical.</p> <p>12 Q And you recall from</p> <p>13 Ms. Smith's deposition, don't you, that</p> <p>14 she says this is the type of</p> <p>15 information that BMI requires from all</p> <p>16 of its licensees in order to allocate</p> <p>17 performance income?</p> <p>18 MR. MARDEROSIAN: I'm just</p> <p>19 going to object.</p> <p>20 Q Do you recall that?</p> <p>21 MR. MARDEROSIAN: Outside the</p> <p>22 scope of the opinion.</p> <p>23 Vague and ambiguous. Calls</p> <p>24 for speculation.</p> <p>25 A I don't recall everything she</p>	<p style="text-align: right;">Page 345</p> <p>1 KOHN</p> <p>2 many do you think you looked at? I</p> <p>3 know that there's probably 1,000 or</p> <p>4 more.</p> <p>5 How many -- do you think you</p> <p>6 looked at 100, 200? Do you know?</p> <p>7 A No, that much. Maybe 20 or</p> <p>8 so. I looked at the ones that were --</p> <p>9 had mistakes in it. And then I found</p> <p>10 others that I couldn't really tell.</p> <p>11 Q How would you --</p> <p>12 A Well, the things that said</p> <p>13 Mix Tape on it as the composer name.</p> <p>14 Q But in looking at the cue</p> <p>15 sheets, how would you know before</p> <p>16 you -- how would you know there were</p> <p>17 mistakes on cue sheets unless somebody</p> <p>18 told you to look at particular cue</p> <p>19 sheets if you're just going into the</p> <p>20 body of cue sheets?</p> <p>21 A They might have.</p> <p>22 Q They might have told you?</p> <p>23 A Yeah.</p> <p>24 Q So the mistaken or the</p> <p>25 incorrect cue sheets may have been</p>

<p style="text-align: right;">Page 346</p> <p>1 KOHN</p> <p>2 preselected for you to look at?</p> <p>3 A Some of them. Some of them</p> <p>4 were pointed out to me.</p> <p>5 Q Okay. And you didn't</p> <p>6 undertake to try to assess, you know,</p> <p>7 whether there was a large or small</p> <p>8 number relative to the total number of</p> <p>9 cue sheets?</p> <p>10 A No, I wasn't asked to do</p> <p>11 that.</p> <p>12 Q Okay.</p> <p>13 In your report -- well, you</p> <p>14 say here there were many cue sheets</p> <p>15 reflecting inaccurate information and</p> <p>16 you've testified now as to the range of</p> <p>17 numbers that you saw, I think in your</p> <p>18 report you actually only identify one</p> <p>19 cue sheet that was inaccurate because</p> <p>20 it didn't identify the plaintiffs as</p> <p>21 authors; is that right?</p> <p>22 A Yeah, I identified one. That</p> <p>23 was probably the most glaring one that</p> <p>24 I --</p> <p>25 Q Page 47 of your report, I</p>	<p style="text-align: right;">Page 348</p> <p>1 KOHN</p> <p>2 screenshot, correct?</p> <p>3 A Yes.</p> <p>4 Q Okay. But it starts on</p> <p>5 Page 47 is where you're talking about</p> <p>6 this?</p> <p>7 A Right.</p> <p>8 Q Now, that is the one cue</p> <p>9 sheet that you do identify as having</p> <p>10 inaccurate information in your report,</p> <p>11 correct? Because I looked at it. I</p> <p>12 don't know if there's any others you</p> <p>13 identify.</p> <p>14 A And I think I made a</p> <p>15 statement in here --</p> <p>16 Q You did.</p> <p>17 A -- where I kind of -- I said</p> <p>18 limitations of space in this report</p> <p>19 prevents an accounting of the full</p> <p>20 picture of inaccurate cue sheets</p> <p>21 submitted by Viacom and others that</p> <p>22 went unchecked by Extreme. Let one</p> <p>23 example referenced below suffice at</p> <p>24 this time.</p> <p>25 So I basically stopped after</p>
<p style="text-align: right;">Page 347</p> <p>1 KOHN</p> <p>2 think, is where you identify this.</p> <p>3 A Yeah.</p> <p>4 Q This is --</p> <p>5 A Wait a minute. On 47?</p> <p>6 Q I think it's on 47.</p> <p>7 A I thought I had a picture of</p> <p>8 it.</p> <p>9 Q I think you're talking</p> <p>10 about -- well, you may have a picture</p> <p>11 of it.</p> <p>12 A I thought I did.</p> <p>13 Q But No Turning Back by AMC</p> <p>14 regarding Better Call Sol.</p> <p>15 A Right.</p> <p>16 Q Okay.</p> <p>17 A Right.</p> <p>18 Q I think that was -- that was</p> <p>19 the one -- it's actually -- and can you</p> <p>20 carry on, I think -- you the -- on Page</p> <p>21 50, I think. No, you don't. It's</p> <p>22 50 -- maybe it's 53 -- 54 is where you</p> <p>23 have it.</p> <p>24 A Right.</p> <p>25 Q Okay. Fifty-four is your</p>	<p style="text-align: right;">Page 349</p> <p>1 KOHN</p> <p>2 I saw a number of these and just</p> <p>3 focused on this one and decided to use</p> <p>4 this screenshot.</p> <p>5 Q And so you identified one and</p> <p>6 you said that there are -- the</p> <p>7 limitations of space prevented you from</p> <p>8 identifying others, correct?</p> <p>9 A It didn't prevent me from</p> <p>10 identifying others. It prevented me of</p> <p>11 making this a 400-page report rather</p> <p>12 than a 90-page report or whatever it</p> <p>13 is. It was getting to -- at some point</p> <p>14 I had to stop.</p> <p>15 Q Did anybody tell you that</p> <p>16 your report had to be limited in terms</p> <p>17 of pages?</p> <p>18 A No.</p> <p>19 Q Okay.</p> <p>20 And do you think that</p> <p>21 identifying the other five or six or</p> <p>22 seven cue sheets would have expanded</p> <p>23 your report to 400 pages?</p> <p>24 A Well, maybe I was</p> <p>25 exaggerating a little bit.</p>

<p style="text-align: right;">Page 350</p> <p>1 KOHN</p> <p>2 Q You know, it's a little</p> <p>3 hyperbole.</p> <p>4 A I -- you know, I had to lot</p> <p>5 do in this report. There was a lot</p> <p>6 to -- there was a lot to parse out and</p> <p>7 think through and understand. And you</p> <p>8 can't do everything to 100 percent</p> <p>9 degree. You know, you try to do the</p> <p>10 best you can.</p> <p>11 Q And, again, I think that</p> <p>12 you've testified to this, you don't</p> <p>13 have any -- you haven't done a</p> <p>14 percentage, you know, sort of</p> <p>15 inaccuracy rate?</p> <p>16 MR. MARDEROSIAN: Hold on.</p> <p>17 You've asked and answered</p> <p>18 that.</p> <p>19 Q Okay.</p> <p>20 A You have asked and answered</p> <p>21 that.</p> <p>22 Q I haven't answered it, but I</p> <p>23 certainly asked it.</p> <p>24 A Sorry.</p> <p>25 Q Okay.</p>	<p style="text-align: right;">Page 352</p> <p>1 KOHN</p> <p>2 right.</p> <p>3 A But I also went on TuneSat</p> <p>4 and I took a look at the catalog of</p> <p>5 these recordings that Rob and Aron did.</p> <p>6 And the detections on the TuneSat. It</p> <p>7 was in the tens of thousands. So that</p> <p>8 was the basis of my statement.</p> <p>9 Q Is it your understanding that</p> <p>10 every time a program or promo is</p> <p>11 broadcast, even if it's broadcast</p> <p>12 dozens or hundreds of times, that a</p> <p>13 separate cue sheet is filed for each</p> <p>14 and every single broadcast?</p> <p>15 A Not broadcast but every</p> <p>16 single sync should have one.</p> <p>17 Q So you understand, don't you,</p> <p>18 that it's only the initial broadcast,</p> <p>19 the synchronization license broadcast</p> <p>20 that would have a cue sheet?</p> <p>21 A You're confusing a broadcast</p> <p>22 with a fixation. That is, when you</p> <p>23 synchronization something, that's the</p> <p>24 license for the synchronization is to</p> <p>25 fix the work and that's the</p>
<p style="text-align: right;">Page 351</p> <p>1 KOHN</p> <p>2 You also say in your second</p> <p>3 basis for your -- I think it's on</p> <p>4 Page 9 again. Okay? Maybe not. Let</p> <p>5 me look. It's on 47, I think, where</p> <p>6 you talk about the -- yeah, it's on 47</p> <p>7 where we talk about Better Call Sol,</p> <p>8 that particular statement.</p> <p>9 Do you recall that?</p> <p>10 A Yeah.</p> <p>11 Q Okay.</p> <p>12 What you say is, and through</p> <p>13 a comparison of the amount of TuneSat</p> <p>14 detections when compared to the small</p> <p>15 number of cue sheets on file with BMI.</p> <p>16 Do you see that?</p> <p>17 A Yes.</p> <p>18 Q Okay.</p> <p>19 On number one you didn't</p> <p>20 count the cue sheets, correct?</p> <p>21 A I didn't count them, but my</p> <p>22 understanding is there was a couple</p> <p>23 thousand or something -- or something</p> <p>24 like that.</p> <p>25 Q I think that's probably</p>	<p style="text-align: right;">Page 353</p> <p>1 KOHN</p> <p>2 synchronization license that you're</p> <p>3 giving.</p> <p>4 Q And the initial broadcast of</p> <p>5 it is one broadcast -- you don't get a</p> <p>6 new sync for every broadcast, do you?</p> <p>7 A No, but you get -- the sync</p> <p>8 license is for the reproduction that's</p> <p>9 being made.</p> <p>10 Q Correct.</p> <p>11 A All right.</p> <p>12 And the broadcast is the</p> <p>13 public performance. Don't get the two</p> <p>14 confused.</p> <p>15 Q I don't think I do, and I'll</p> <p>16 try to be clear.</p> <p>17 The cue sheet is only issued</p> <p>18 for the initial broadcast; isn't that</p> <p>19 right?</p> <p>20 A It's the -- the cue sheet --</p> <p>21 oh, the cue sheet --</p> <p>22 Q Is only issued for the</p> <p>23 initial broadcast of the</p> <p>24 synchronization license work?</p> <p>25 A Well, the cue sheet is</p>

<p style="text-align: right;">Page 366</p> <p>1 KOHN</p> <p>2 first got involved in the case I took a</p> <p>3 look at the TuneSat data and came up</p> <p>4 with about 16,000 unique syncs or</p> <p>5 unique programs that contained those</p> <p>6 musical works that are part of the --</p> <p>7 Q Original broadcasts, you're</p> <p>8 saying?</p> <p>9 A You know, I don't like</p> <p>10 original broadcasts. But you could say</p> <p>11 unique programs that contain the</p> <p>12 musical work that were broadcast,</p> <p>13 right, once. And not including all the</p> <p>14 other broadcasts of the same programs.</p> <p>15 I came up with about 16,000.</p> <p>16 Q Now as I recall the --</p> <p>17 MR. MARDEROSIAN: You were</p> <p>18 done?</p> <p>19 THE WITNESS: Yes.</p> <p>20 Q As I recall Aron and Robert</p> <p>21 said there were about 30,000 to 33,000</p> <p>22 total detections; is that right?</p> <p>23 A That sounds about right.</p> <p>24 Q So -- and of that it's your</p> <p>25 testimony that about half of them were</p>	<p style="text-align: right;">Page 368</p> <p>1 KOHN</p> <p>2 many unique syncs that it was.</p> <p>3 Q So back of the envelope?</p> <p>4 A Back of the envelope would be</p> <p>5 a good way to put it.</p> <p>6 Q Now, did you listen to any of</p> <p>7 the audio clips?</p> <p>8 A Yes, I did.</p> <p>9 Q And were you able to make an</p> <p>10 assessment of how many of the</p> <p>11 detections you identified were promos</p> <p>12 as compared to in-program uses or</p> <p>13 didn't you do that?</p> <p>14 A I did. Well, I didn't -- I</p> <p>15 would have had to have listened to</p> <p>16 16,000 individual, which I didn't do</p> <p>17 because I wasn't asked to do that. And</p> <p>18 it would have taken my time and it</p> <p>19 wouldn't have been worth the effort.</p> <p>20 But I saw there was a good mix. There</p> <p>21 was certain in-program uses of music</p> <p>22 and there were promos being</p> <p>23 advertisements for it. They were a</p> <p>24 good mix of it. I don't think I -- I</p> <p>25 might have looked at a the Land Rover</p>
<p style="text-align: right;">Page 367</p> <p>1 KOHN</p> <p>2 just unique original broadcast?</p> <p>3 A I told you I did a rough</p> <p>4 pivot table which took the data and did</p> <p>5 a rough on that. There is another way</p> <p>6 that I didn't do where you can strip</p> <p>7 out on how it goes on multiple</p> <p>8 networks. Okay? Because as you</p> <p>9 mentioned earlier, you can have a</p> <p>10 particular program on the TuneSat that</p> <p>11 happened to be broadcast on Turner in</p> <p>12 the United States and then broadcasted</p> <p>13 on some German station some time later.</p> <p>14 I didn't go to the length of</p> <p>15 stripping out the multiple networks</p> <p>16 that it could be. But when I looked at</p> <p>17 the data, 67 percent were the United</p> <p>18 States. A program that was on MTV was</p> <p>19 likely to be on MTV. So if I came up</p> <p>20 with 16,000, I'm looking at maybe</p> <p>21 there's 15,000 that I could strip -- if</p> <p>22 I had to strip out some duplicates on</p> <p>23 alternative networks around the world.</p> <p>24 So it was a -- it was a quick</p> <p>25 look at it to give me an idea of how</p>	<p style="text-align: right;">Page 369</p> <p>1 KOHN</p> <p>2 commercial and the Starbucks commercial</p> <p>3 in there. I might have found it. I</p> <p>4 might have listened to it, but I don't</p> <p>5 remember.</p> <p>6 But I poked around it to see</p> <p>7 what was there but I did not do what</p> <p>8 you had asked me. And I did not do a</p> <p>9 calculations as to how much were this</p> <p>10 kind and how much were that kind.</p> <p>11 Q Turn to Exhibit B of your</p> <p>12 report, if you would.</p> <p>13 (Whereupon, a brief recess</p> <p>14 was taken.)</p> <p>15 Q Okay.</p> <p>16 I think when we broke, I had</p> <p>17 asked you to look at your Exhibit B --</p> <p>18 A Yes.</p> <p>19 Q -- to your report. Do you</p> <p>20 recall? Pull it out.</p> <p>21 A Okay. Exhibit B.</p> <p>22 Q And you say these are unique</p> <p>23 TuneSat detections?</p> <p>24 A That's what the title of it</p> <p>25 is.</p>

<p style="text-align: right;">Page 370</p> <p>1 KOHN</p> <p>2 Q Are they unique?</p> <p>3 A Yes. That's my understanding</p> <p>4 of what they are. I didn't produce</p> <p>5 these.</p> <p>6 Q You didn't --</p> <p>7 A No.</p> <p>8 Q -- create this document?</p> <p>9 A No.</p> <p>10 Q So somebody else created it,</p> <p>11 and told you what it was?</p> <p>12 A Well, I was given it by</p> <p>13 attorneys; and I understand that Karen</p> <p>14 Rodriguez had prepared it.</p> <p>15 Q Okay.</p> <p>16 And the total number of</p> <p>17 detections when you add them up are</p> <p>18 about 21, nearly 22,000, correct?</p> <p>19 You've got 6,848 and 15,093.</p> <p>20 A Fifteen plus six, yeah, about</p> <p>21 22,000, something like that.</p> <p>22 Q I said about 22,000 or close</p> <p>23 to 22,000.</p> <p>24 And you multiplied \$200</p> <p>25 against every one of these detections?</p>	<p style="text-align: right;">Page 372</p> <p>1 KOHN</p> <p>2 what unique is.</p> <p>3 Q Do you know how many of these</p> <p>4 detections -- I assume you're going to</p> <p>5 know the answer -- are Viacom</p> <p>6 detections, detections of broadcasts on</p> <p>7 Viacom networks?</p> <p>8 A I could do that.</p> <p>9 Q You could pull it out from</p> <p>10 the list?</p> <p>11 A Right. Like MTV Classic is</p> <p>12 MTV2. MTV -- we can probably pull out</p> <p>13 and add the numbers up.</p> <p>14 Q So we can add up what the</p> <p>15 total number of MTV detections are?</p> <p>16 MR. MARDEROSIAN: Well, he</p> <p>17 said he did not prepare this.</p> <p>18 MR. ZAKARIN: I understand.</p> <p>19 MR. MARDEROSIAN: And I think</p> <p>20 that's a question for Karen</p> <p>21 Rodriguez.</p> <p>22 MR. ZAKARIN: Well, the</p> <p>23 problem is it's attached to his</p> <p>24 report.</p> <p>25 MR. MARDEROSIAN: I think</p>
<p style="text-align: right;">Page 371</p> <p>1 KOHN</p> <p>2 A Yeah.</p> <p>3 Q But you don't know if these</p> <p>4 are unique detections, correct?</p> <p>5 A Well, it says unique</p> <p>6 detections. And I understood them to</p> <p>7 be unique detections. I had previously</p> <p>8 given a back of the envelope done in my</p> <p>9 own way, way back in February when I</p> <p>10 started working on the case and using</p> <p>11 data that went all the way back to 2013</p> <p>12 or something like that. And -- like I</p> <p>13 said. So when I saw these numbers I</p> <p>14 said it's in the realm of -- again, I</p> <p>15 did back of the envelope and I just</p> <p>16 took these as what it was.</p> <p>17 Q But now they've gone up by</p> <p>18 some nearly 7,000 from your number?</p> <p>19 A Apparently.</p> <p>20 Q And you don't know whether</p> <p>21 they are or not unique detections?</p> <p>22 A I'm not the one who generated</p> <p>23 this. So I don't know whether they're</p> <p>24 unique in the way that you and I have</p> <p>25 been talking about my understanding of</p>	<p style="text-align: right;">Page 373</p> <p>1 KOHN</p> <p>2 just to be fair about it, I think</p> <p>3 he relied on it on a specific</p> <p>4 narrow topic in his report, Don.</p> <p>5 And that was the extent of his use</p> <p>6 of this document.</p> <p>7 But you can ask whatever you</p> <p>8 want, but I think these are</p> <p>9 questions for Karen Rodriguez.</p> <p>10 MR. ZAKARIN: Unusually, you</p> <p>11 know, I ask witnesses about their</p> <p>12 reports and other witnesses about</p> <p>13 their reports. And if he relied</p> <p>14 upon somebody else to do something</p> <p>15 and he's basically just, in</p> <p>16 effect, saying what somebody has</p> <p>17 told him, I'm entitled to know</p> <p>18 that. That's all.</p> <p>19 MR. MARDEROSIAN: I get that,</p> <p>20 absolutely. But the operative</p> <p>21 phrase is do something and I'm</p> <p>22 saying you should ask him what it</p> <p>23 is that he used it for.</p> <p>24 MR. ZAKARIN: I know what he</p> <p>25 used it for. It's in his report.</p>

<p style="text-align: right;">Page 374</p> <p>1 KOHN</p> <p>2 Anyway, let's continue on.</p> <p>3 Q In terms of -- so we could</p> <p>4 figure out which are Viacom channels</p> <p>5 and therefore which are Viacom</p> <p>6 detections, correct?</p> <p>7 A Yes, if we knew what Viacom's</p> <p>8 channels are.</p> <p>9 Q For which you applied \$200</p> <p>10 for each and every one of the</p> <p>11 detections, correct?</p> <p>12 A Well, are you just saying the</p> <p>13 same thing for each -- yeah, I used the</p> <p>14 total numbers here and multiplied it by</p> <p>15 \$200.</p> <p>16 Q And in terms of these</p> <p>17 detections, do you know how many are</p> <p>18 not works that were delivered to Viacom</p> <p>19 Extreme but are owned by others</p> <p>20 including the plaintiffs?</p> <p>21 MR. MARDEROSIAN: Objection.</p> <p>22 Vague.</p> <p>23 Q You know that the plaintiffs</p> <p>24 self-published works, right?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 376</p> <p>1 KOHN</p> <p>2 because I want to object to it</p> <p>3 before you agree to it.</p> <p>4 Q -- they have to get backed</p> <p>5 out?</p> <p>6 MR. MARDEROSIAN: I'm going</p> <p>7 to object.</p> <p>8 It's an incomplete</p> <p>9 hypothetical, and it doesn't</p> <p>10 include the fact that there's</p> <p>11 evidence that Extreme is taking</p> <p>12 Aron and Robert's own publishing</p> <p>13 for Lonely Orchard and Brothers</p> <p>14 Heathen.</p> <p>15 Q You can answer my question as</p> <p>16 opposed to the rhetoric there.</p> <p>17 A My understanding is that</p> <p>18 these were unique detections of</p> <p>19 music -- musical work, sound recordings</p> <p>20 that were created by Aron and Rob and</p> <p>21 delivered under the contract.</p> <p>22 Q But in fact you don't know</p> <p>23 whether these were, in fact, delivered</p> <p>24 or are self-published?</p> <p>25 MR. MARDEROSIAN: I'm just</p>
<p style="text-align: right;">Page 375</p> <p>1 KOHN</p> <p>2 Q Do you know how many of these</p> <p>3 detections are of the plaintiffs'</p> <p>4 self-published works?</p> <p>5 A I think -- I didn't generate</p> <p>6 this. So I don't have the underlying</p> <p>7 data that was used to generate this. I</p> <p>8 wouldn't be able to answer any of those</p> <p>9 questions.</p> <p>10 Q You with agree with me though</p> <p>11 that there's no reason to charge or</p> <p>12 make a claim against Extreme or Viacom</p> <p>13 for \$200 per each of the plaintiffs'</p> <p>14 own works?</p> <p>15 A No.</p> <p>16 Q Okay.</p> <p>17 A Absolutely not.</p> <p>18 Q So if the plaintiffs'</p> <p>19 self-published works or works published</p> <p>20 by third parties are among these</p> <p>21 detections --</p> <p>22 A Right.</p> <p>23 Q -- they have --</p> <p>24 MR. MARDEROSIAN: Hold on.</p> <p>25 Let him finish the question</p>	<p style="text-align: right;">Page 377</p> <p>1 KOHN</p> <p>2 going to object.</p> <p>3 It's an incomplete</p> <p>4 hypothetical and vague.</p> <p>5 Q You can answer.</p> <p>6 MR. MARDEROSIAN: And doesn't</p> <p>7 include the issue over whether or</p> <p>8 not Extreme is taking the</p> <p>9 plaintiffs' published --</p> <p>10 self-published songs.</p> <p>11 A And I don't know whether this</p> <p>12 is an underrepresentation and doesn't</p> <p>13 include all of their songs that were</p> <p>14 delivered and used.</p> <p>15 Q So you don't know very much</p> <p>16 at all about this document?</p> <p>17 A That's right.</p> <p>18 Q Essentially, what you did is</p> <p>19 you took the number of detections</p> <p>20 without knowing what they are and</p> <p>21 multiplied each one by 200?</p> <p>22 A And that wasn't the essential</p> <p>23 part of my report. The essential part</p> <p>24 of my report was coming up with the</p> <p>25 \$200 figure. If this wasn't included,</p>

95 (Pages 374 - 377)

<p style="text-align: right;">Page 378</p> <p>1 KOHN</p> <p>2 it wouldn't have mattered because</p> <p>3 whichever the true number is would be</p> <p>4 multiplied by \$200. If it was --</p> <p>5 instead of 21,000, if it was 16,000, if</p> <p>6 it was 30,000, whatever that number is.</p> <p>7 And I'm sure enough good minds can get</p> <p>8 together and figure out using the</p> <p>9 TuneSat data what the proper number is.</p> <p>10 Q We'll come to the 200 in due</p> <p>11 course.</p> <p>12 In any event, if I understand</p> <p>13 you correctly you -- it's your view</p> <p>14 that the 200 is the right number for --</p> <p>15 for these -- for all of those</p> <p>16 detections, that's your opinion?</p> <p>17 MR. MARDEROSIAN: Right</p> <p>18 number for what?</p> <p>19 Q The right number for the sync</p> <p>20 fee for each of these 200 detections</p> <p>21 that you have opined?</p> <p>22 A My report says what it says</p> <p>23 about the \$200 number. We can turn to</p> <p>24 it. I don't want to say anything</p> <p>25 that's inconsistent and be --</p>	<p style="text-align: right;">Page 380</p> <p>1 KOHN</p> <p>2 to each of these. So your view is, at</p> <p>3 the very least, for the CBS promo use</p> <p>4 200 would be the right number?</p> <p>5 A 200 would be the right number</p> <p>6 to use across the board for the</p> <p>7 detections -- unique detections that</p> <p>8 were discovered during the period from</p> <p>9 mid-2014 to the present.</p> <p>10 Q But one of those is you look</p> <p>11 at CBS promo use and you figure they</p> <p>12 charge 120. I think 200 is the right</p> <p>13 one?</p> <p>14 A Well, there might have been</p> <p>15 an in-program use -- well, I call it an</p> <p>16 in-program use -- that might have been</p> <p>17 worth \$20,000 or worth more. But I</p> <p>18 picked 200 as an overall way of just</p> <p>19 going across the board to simplify it.</p> <p>20 Q Could you look at Exhibit A</p> <p>21 of your report for a second. And we'll</p> <p>22 come back to that.</p> <p>23 A Yes.</p> <p>24 Q Exhibit A, this you have done</p> <p>25 all by yourself?</p>
<p style="text-align: right;">Page 379</p> <p>1 KOHN</p> <p>2 Q Well, let's look at Page 86</p> <p>3 which is where I think come up with</p> <p>4 this.</p> <p>5 A Thank you. Thank you.</p> <p>6 Q Okay.</p> <p>7 A That's helpful.</p> <p>8 Q I think this is where you</p> <p>9 explain how you came up with your \$200.</p> <p>10 A I'm there.</p> <p>11 Q Okay.</p> <p>12 And if I -- I want to</p> <p>13 characterize this correctly, what you</p> <p>14 did was you looked at the license of</p> <p>15 their works to CBS for a promo use for</p> <p>16 \$120, correct?</p> <p>17 A Yes.</p> <p>18 Q And you compared that to an</p> <p>19 in-program license use of one of their</p> <p>20 own works, meaning Rob and Aron, for</p> <p>21 \$300. And you then -- and you</p> <p>22 reference to up to 20,000 for works</p> <p>23 they own control. You mentioned that.</p> <p>24 And then you conclude, I think you just</p> <p>25 say I therefore applied the sum of 200</p>	<p style="text-align: right;">Page 381</p> <p>1 KOHN</p> <p>2 A No.</p> <p>3 Q Who helped with you with this</p> <p>4 one?</p> <p>5 A I had asked Rob and Aron to</p> <p>6 come up with what they think are</p> <p>7 reasonable fees based upon their works.</p> <p>8 I asked them to send me license</p> <p>9 agreements that they had for their own.</p> <p>10 And I took their numbers and validated</p> <p>11 them. I didn't think -- I didn't</p> <p>12 disagree with any of them.</p> <p>13 Q Did you examine the terms of</p> <p>14 those license agreements?</p> <p>15 A Yes.</p> <p>16 Q You don't know whether those</p> <p>17 license agreements were provided to the</p> <p>18 defendants, do you?</p> <p>19 A No.</p> <p>20 Q I was curious about a couple</p> <p>21 of things.</p> <p>22 MR. MARDEROSIAN: Do you know</p> <p>23 if the defendants even asked for</p> <p>24 those?</p> <p>25 THE WITNESS: I don't know.</p>

<p style="text-align: right;">Page 382</p> <p>1 KOHN</p> <p>2 Q I was curious about</p> <p>3 something.</p> <p>4 A Go ahead.</p> <p>5 Q In the middle of the page you</p> <p>6 have CBS on-air promos fourth quarter</p> <p>7 2016, CBS marketing third quarter 2016</p> <p>8 promos.</p> <p>9 Do you see that?</p> <p>10 A No, I don't.</p> <p>11 Q It's down about one-third of</p> <p>12 the way down.</p> <p>13 A What's the first word? CBS?</p> <p>14 Q CBS.</p> <p>15 A On-air promos.</p> <p>16 Q Yes. And there are promos --</p> <p>17 there's two entries for promos.</p> <p>18 Do you see that?</p> <p>19 A CBS on-air promos, fourth</p> <p>20 quarter 2016.</p> <p>21 Q Two in a row.</p> <p>22 A And this is CBS marketing?</p> <p>23 Q CBS marketing third quarter</p> <p>24 2016 promos.</p> <p>25 A Yes, I see them now.</p>	<p style="text-align: right;">Page 384</p> <p>1 KOHN</p> <p>2 MR. MARDEROSIAN: Incorrect.</p> <p>3 This is for direct needle drop</p> <p>4 licenses here.</p> <p>5 MR. ZAKARIN: I know what it</p> <p>6 is.</p> <p>7 MR. MARDEROSIAN: It's not</p> <p>8 for the figure that he applies to</p> <p>9 the blanket --</p> <p>10 COURT REPORTER: Excuse me.</p> <p>11 THE WITNESS: Sorry. My</p> <p>12 fault.</p> <p>13 MR. ZAKARIN: You're not</p> <p>14 testifying. So please answer my</p> <p>15 question.</p> <p>16 MR. MARDEROSIAN: Well, then</p> <p>17 let me just object that you're</p> <p>18 mischaracterizing the evidence.</p> <p>19 A Yeah. When I applied the</p> <p>20 \$200 figure I was taking into</p> <p>21 consideration that there's all sorts of</p> <p>22 things and under 21,000 different uses.</p> <p>23 It would have been</p> <p>24 impractical for me to go through every</p> <p>25 single one and do an evaluation as to</p>
<p style="text-align: right;">Page 383</p> <p>1 KOHN</p> <p>2 Q They're both the 120?</p> <p>3 A Right.</p> <p>4 Q As you -- as in your --</p> <p>5 Page 86 of your report, correct?</p> <p>6 A Correct.</p> <p>7 Q But here instead of \$200 you</p> <p>8 apply \$10,000 for each of them as the</p> <p>9 proper fee, right? That's what you</p> <p>10 think is the fair fee there?</p> <p>11 MR. MARDEROSIAN: No, you're</p> <p>12 misreading this.</p> <p>13 MR. ZAKARIN: No, actually</p> <p>14 I'm reading it accurately.</p> <p>15 MR. MARDEROSIAN: No, no. I</p> <p>16 think you're misreading it but you</p> <p>17 can treat it anyway that you want.</p> <p>18 Q You total -- if you total up</p> <p>19 the second column, it comes out</p> <p>20 \$1,975,000, right? Mr. Kohn?</p> <p>21 A When I looked at -- okay,</p> <p>22 yeah, the total says \$1,975,000.</p> <p>23 Q And in calculating your</p> <p>24 damage claim, you take 50 percent of</p> <p>25 that number, don't you?</p>	<p style="text-align: right;">Page 385</p> <p>1 KOHN</p> <p>2 whether it was a commercial or a</p> <p>3 foreground vocal use versus a source</p> <p>4 use like coming out of a radio in a car</p> <p>5 or that kind of a thing. And also here</p> <p>6 I looked at -- when I saw it says</p> <p>7 promos, I may have taken a look at that</p> <p>8 and said maybe that was multiple</p> <p>9 different promos. I might have done</p> <p>10 that and not taken it as a single</p> <p>11 promo. But they're apples and oranges,</p> <p>12 is what I'm saying. These were, for</p> <p>13 the most part, discrete licenses that</p> <p>14 were issued by Extreme as opposed to</p> <p>15 the --</p> <p>16 Q Page 86 aren't you referring</p> <p>17 to a discreet license?</p> <p>18 A That's right. These are</p> <p>19 discreet licenses.</p> <p>20 Q Okay.</p> <p>21 And you've applied \$200</p> <p>22 rather than 120. And now here you're</p> <p>23 applying \$10,000 rather than 200; isn't</p> <p>24 that correct?</p> <p>25 MR. MARDEROSIAN: No, it's</p>

<p style="text-align: right;">Page 386</p> <p>1 KOHN</p> <p>2 not.</p> <p>3 MR. ZAKARIN: You're not</p> <p>4 testifying, Mick.</p> <p>5 MR. MARDEROSIAN: You're</p> <p>6 mischaracterizing the evidence and</p> <p>7 the document.</p> <p>8 Q Here it's \$10,000 that you</p> <p>9 think is the right amount or at least</p> <p>10 Rob and Aaron figure was the right</p> <p>11 amount and in Exhibit A it's \$200?</p> <p>12 A There's a huge difference</p> <p>13 between CBS and some cable channel --</p> <p>14 Yes channels or some whatever. This is</p> <p>15 CBS. It's a network.</p> <p>16 Q Take a look on Exhibit B, if</p> <p>17 you will. Okay. Exhibit B again.</p> <p>18 Unique TuneSat detections. Okay.</p> <p>19 Do you see CBS is listed</p> <p>20 right there?</p> <p>21 A Okay.</p> <p>22 But so is --</p> <p>23 Q So now you've -- so CBS is</p> <p>24 real different. You're including it.</p> <p>25 A But so is something called</p>	<p style="text-align: right;">Page 388</p> <p>1 KOHN</p> <p>2 talks about needle drops. And</p> <p>3 basically that's about the -- that's</p> <p>4 about the price that you would get,</p> <p>5 \$200.</p> <p>6 Q Okay.</p> <p>7 And so here for the CBS</p> <p>8 promos the appropriate price is not</p> <p>9 \$200 but it's \$10,000 for each promo,</p> <p>10 right? That's your -- that's what</p> <p>11 you've done here?</p> <p>12 A No, but you're taking apples</p> <p>13 and oranges.</p> <p>14 Q Okay.</p> <p>15 That's -- your testimony is</p> <p>16 whatever your testimony is there.</p> <p>17 A Okay. That's my testimony.</p> <p>18 Q Okay.</p> <p>19 A I mean, you're trying to</p> <p>20 suggest that these are the same thing.</p> <p>21 When I take \$200 and do it as an</p> <p>22 average some of them are CBS, which is</p> <p>23 a huge network, and some of them are</p> <p>24 networks you've never heard of. NY9 I</p> <p>25 never heard of. Maybe nobody watched</p>
<p style="text-align: right;">Page 387</p> <p>1 KOHN</p> <p>2 GAC, which I've never even heard of.</p> <p>3 What about the Oxygen channel -- the</p> <p>4 Ovation channel I've never heard of.</p> <p>5 The Hub I've never heard of. Something</p> <p>6 called Showtime East, 1,674. This --</p> <p>7 when I have to apply -- I'm not going</p> <p>8 to go through every single one of</p> <p>9 those. So I gave 200 to CBS, but I</p> <p>10 gave 200 to something called TLC.</p> <p>11 Q And you have no idea what</p> <p>12 they do. You don't even know some of</p> <p>13 those broadcasters, right?</p> <p>14 A I don't -- I -- that's the</p> <p>15 point.</p> <p>16 Q Okay.</p> <p>17 A You know.</p> <p>18 Q So you just arbitrarily</p> <p>19 picked the \$200?</p> <p>20 A I didn't arbitrarily pick it.</p> <p>21 I picked it -- if you're going to</p> <p>22 take -- try to come up with a</p> <p>23 reasonable amount that wasn't 120, that</p> <p>24 wasn't 300, and I thought 200.</p> <p>25 Basically if you look in my book, it</p>	<p style="text-align: right;">Page 389</p> <p>1 KOHN</p> <p>2 the NY9 and got \$200 for the promo for</p> <p>3 it.</p> <p>4 Q Is the \$10,000 that you put</p> <p>5 in there, is that also in your Exhibit</p> <p>6 B? Is it the same use as Exhibit B?</p> <p>7 A I don't know.</p> <p>8 Q So you could have a</p> <p>9 duplication there?</p> <p>10 A I might have a duplication.</p> <p>11 Q You don't know that?</p> <p>12 A Neither do you. I don't know</p> <p>13 whether I do.</p> <p>14 Q Not my burden.</p> <p>15 Did you -- by the way on your</p> <p>16 Exhibit B, did you back out what was</p> <p>17 actually paid on any of those licenses?</p> <p>18 A I was not asked to do that.</p> <p>19 Q Okay.</p> <p>20 So you were just asked to</p> <p>21 come up with a gross number and put</p> <p>22 that forward as the damage claim?</p> <p>23 A I was asked to come up with</p> <p>24 the \$200 amount. All right. I was</p> <p>25 given the unique numbers. I did the</p>

<p style="text-align: right;">Page 390</p> <p>1 KOHN</p> <p>2 multiplication. It was towards the end</p> <p>3 of this. I didn't have the information</p> <p>4 to back it out. And I wasn't provided</p> <p>5 to -- but it. But it could be backed</p> <p>6 out by somebody else.</p> <p>7 Q Lots of things could be done,</p> <p>8 but it wasn't done. So this is put</p> <p>9 forth -- you're aware that you've put</p> <p>10 this forth as a damage claim, \$200</p> <p>11 times 20 -- almost 22,000 detections?</p> <p>12 A Well, I also said to you that</p> <p>13 I'm not the one who came up with the</p> <p>14 22,000 detections. All right?</p> <p>15 Q Is it your testimony --</p> <p>16 A Somebody -- you know,</p> <p>17 somebody else came up with that number</p> <p>18 and I came up with the \$200. I made a</p> <p>19 multiplication of the two numbers. One</p> <p>20 number I came up with. Another number</p> <p>21 somebody else came up with, and that's</p> <p>22 what I put in here.</p> <p>23 Q At the bottom of -- here,</p> <p>24 based on my calculations, Page 86, Aron</p> <p>25 and Rob share of these broadcast</p>	<p style="text-align: right;">Page 392</p> <p>1 KOHN</p> <p>2 role.</p> <p>3 A Yeah. I --</p> <p>4 Q It's in his report.</p> <p>5 A I wasn't asked to back it</p> <p>6 out.</p> <p>7 MR. MARDEROSIAN: Your</p> <p>8 question on this topic is not in</p> <p>9 his report.</p> <p>10 You're mischaracterizing the</p> <p>11 evidence.</p> <p>12 MR. ZAKARIN: Well, we'll</p> <p>13 see.</p> <p>14 Q And you don't know whether</p> <p>15 that 2,194,000 duplicates your other</p> <p>16 number in Exhibit A in any respect, do</p> <p>17 you?</p> <p>18 MR. MARDEROSIAN:</p> <p>19 Mischaracterizes the evidence.</p> <p>20 Vague. Incomplete</p> <p>21 hypothetical.</p> <p>22 A So if we backed out -- how</p> <p>23 many uniques are on Exhibit A? Can we</p> <p>24 count them? Two, four, six, ten, maybe</p> <p>25 30.</p>
<p style="text-align: right;">Page 391</p> <p>1 KOHN</p> <p>2 licensing fees for the 15,093 unique</p> <p>3 audiovisual works, it's really almost</p> <p>4 22,000 --</p> <p>5 A Yeah.</p> <p>6 Q -- in which their music was</p> <p>7 suffixed for the period spanning</p> <p>8 July 1, 2014 to August 1, 2018 is</p> <p>9 \$2,194,100.</p> <p>10 That's put forth as a damage</p> <p>11 claim. Are you aware of that?</p> <p>12 A I'm not familiar with the</p> <p>13 term damage claim as litigators use it.</p> <p>14 So I --</p> <p>15 Q Are you aware that that is</p> <p>16 part of the plaintiffs' claim that they</p> <p>17 have supposedly been deprived of that</p> <p>18 money?</p> <p>19 A Yes.</p> <p>20 Q Okay.</p> <p>21 And you don't know whether</p> <p>22 what they were actually paid is or is</p> <p>23 not backed out of that number?</p> <p>24 MR. MARDEROSIAN: It calls</p> <p>25 for speculation. This is not his</p>	<p style="text-align: right;">Page 393</p> <p>1 KOHN</p> <p>2 Q I'm more interested in your</p> <p>3 number.</p> <p>4 A Let me ask you this: There</p> <p>5 are 30 of them there, right?</p> <p>6 Q Yes.</p> <p>7 A Okay.</p> <p>8 Let's subtract 30 from</p> <p>9 21,000.</p> <p>10 Q Let's subtract 1,975,000 from</p> <p>11 it.</p> <p>12 A No, because these are</p> <p>13 completely different. This is a Land</p> <p>14 Rover commercial for example.</p> <p>15 Q Which is also time barred.</p> <p>16 You're aware of that, aren't you?</p> <p>17 MR. MARDEROSIAN: No, it's</p> <p>18 not time barred because there's an</p> <p>19 e-mail from your client after</p> <p>20 July 1, 2014, offering to pay them</p> <p>21 the money. It's still a claim</p> <p>22 that's on the table. I'm sorry.</p> <p>23 By the admission of your own</p> <p>24 client.</p> <p>25 MR. ZAKARIN: The claim is</p>

<p style="text-align: right;">Page 394</p> <p>1 KOHN</p> <p>2 gone, long gone.</p> <p>3 MR. MARDEROSIAN: Don't try</p> <p>4 to instruct the client as to what</p> <p>5 the damage claim is because this</p> <p>6 is not his realm, and it's</p> <p>7 contrary to the evidence. Okay?</p> <p>8 MR. ZAKARIN: No, it's not</p> <p>9 contrary to the evidence.</p> <p>10 MR. MARDEROSIAN: Yes, it is.</p> <p>11 MR. ZAKARIN: It's in his</p> <p>12 report.</p> <p>13 MR. MARDEROSIAN: Whatever,</p> <p>14 Don. It's argumentative.</p> <p>15 MR. ZAKARIN: It's in his</p> <p>16 report.</p> <p>17 MR. MARDEROSIAN: What's in</p> <p>18 his report?</p> <p>19 MR. ZAKARIN: The damage</p> <p>20 claim.</p> <p>21 Q Let's continue, Mr. Kohn.</p> <p>22 So you've got here -- you've</p> <p>23 taken from Aron and Robert their</p> <p>24 proposed numbers and you've included</p> <p>25 that here and you totaled them up,</p>	<p style="text-align: right;">Page 396</p> <p>1 KOHN</p> <p>2 to blanket licenses or fees from</p> <p>3 blanket licenses, that it should be</p> <p>4 allocated on a usage basis not across</p> <p>5 the libraries licensed?</p> <p>6 A I said that it was the custom</p> <p>7 and practice to take blanket -- fees</p> <p>8 that were generated on a blanket basis</p> <p>9 and allocate them based upon usage, not</p> <p>10 based upon the number of songs.</p> <p>11 Q Well, actually the next</p> <p>12 statement tells us what you say, which</p> <p>13 is -- give me a second.</p> <p>14 It says the determination --</p> <p>15 A Would you please tell us the</p> <p>16 page --</p> <p>17 Q Page 11. The determination</p> <p>18 of the relevant share based on the</p> <p>19 number of songs rather than the usage</p> <p>20 of the songs is inconsistent with both</p> <p>21 the terms of the 2011 composer</p> <p>22 agreement and customs and practices in</p> <p>23 the industry.</p> <p>24 What I want to try to do</p> <p>25 first is deal with -- because you just</p>
<p style="text-align: right;">Page 395</p> <p>1 KOHN</p> <p>2 right?</p> <p>3 A Yes.</p> <p>4 Q Okay. I just wanted to know</p> <p>5 where it came from.</p> <p>6 We'll come back to this a</p> <p>7 little bit later. Page 11 and onto</p> <p>8 Page 12 of your report. Now we get to</p> <p>9 your allocation theories.</p> <p>10 You say towards the bottom,</p> <p>11 the next to last bullet point on Page</p> <p>12 11, when licenses are granted on a</p> <p>13 blanket basis Aron and Robert are</p> <p>14 entitled to a pro rata share, their</p> <p>15 relevant share based upon the usage of</p> <p>16 their songs and recordings, not based</p> <p>17 upon the number of songs they delivered</p> <p>18 in relation to the total number of</p> <p>19 songs in the catalogs licensed.</p> <p>20 So let's parse that a little</p> <p>21 bit and go through it. You propose</p> <p>22 that there should be a usage based</p> <p>23 allocation model, correct?</p> <p>24 A Repeat the question.</p> <p>25 Q You propose that with respect</p>	<p style="text-align: right;">Page 397</p> <p>1 KOHN</p> <p>2 said it's inconsistent with customs and</p> <p>3 practices, correct?</p> <p>4 A Yes.</p> <p>5 Q Okay.</p> <p>6 A Not just that but --</p> <p>7 Q You've said the contract and</p> <p>8 customs and practices.</p> <p>9 A Right.</p> <p>10 Q Let's deal with customs and</p> <p>11 practices first.</p> <p>12 In terms of the customs and</p> <p>13 practices of production music libraries</p> <p>14 in determining how they allocate</p> <p>15 blanket licenses, did you contact any</p> <p>16 production music libraries to find out</p> <p>17 how they did it?</p> <p>18 A Excuse me. I was distracted.</p> <p>19 Q I'm sorry.</p> <p>20 MR. ZAKARIN: Why don't we</p> <p>21 reread the question, please.</p> <p>22 (Whereupon, the record was</p> <p>23 read.)</p> <p>24 A Not since I was engaged in</p> <p>25 this case.</p>

<p style="text-align: right;">Page 398</p> <p>1 KOHN</p> <p>2 Q Did you do it before?</p> <p>3 A I learned it through 35 years</p> <p>4 of discussing it with people, at least</p> <p>5 the past ten years of discussing it</p> <p>6 with people in the industry.</p> <p>7 Q Who did you discuss it with</p> <p>8 over the last ten years, can you</p> <p>9 identify anybody?</p> <p>10 A No, I can't -- no, I can't</p> <p>11 identify any specific person.</p> <p>12 Q And since you were retained,</p> <p>13 you didn't talk to anybody?</p> <p>14 A Well, I'm trying to think --</p> <p>15 no, since I've been retained, I didn't</p> <p>16 need to.</p> <p>17 Q And you can't identify any of</p> <p>18 these people in the production music</p> <p>19 library --</p> <p>20 A Well --</p> <p>21 Q Let me finish. It will be</p> <p>22 clear if I finish.</p> <p>23 A You started a question before</p> <p>24 I finished the last answer. But answer</p> <p>25 your -- ask your question.</p>	<p style="text-align: right;">Page 400</p> <p>1 KOHN</p> <p>2 is just a summary. Let's go back to</p> <p>3 the section of my report where I</p> <p>4 discuss this. You will have to help me</p> <p>5 here.</p> <p>6 MR. MARDEROSIAN: Take your</p> <p>7 time.</p> <p>8 A Okay. I think it's Page 71.</p> <p>9 Okay?</p> <p>10 Q Yes.</p> <p>11 A All right.</p> <p>12 So you're going to ask me a</p> <p>13 series of questions about who talked I</p> <p>14 to and since I didn't talk to -- I</p> <p>15 can't remember who I talked to, it's</p> <p>16 not fair to me at all.</p> <p>17 So it really is on Page 76.</p> <p>18 Q Okay.</p> <p>19 A Where I give a number of</p> <p>20 examples. I start with, I believe --</p> <p>21 and after I discuss the PROs usage if</p> <p>22 ASCAP or BMI allocated --</p> <p>23 Q Where on 76 is this?</p> <p>24 A I think I'm going back to 74.</p> <p>25 Q Okay. Now we're on 74.</p>
<p style="text-align: right;">Page 399</p> <p>1 KOHN</p> <p>2 Q You can't identify anybody</p> <p>3 that you've spoken with since you were</p> <p>4 retained to discuss that issue. And</p> <p>5 I'm asking you, you can't identify any</p> <p>6 of the people that you spoke with who</p> <p>7 were in the production music library</p> <p>8 business in the ten years prior to your</p> <p>9 retention; is that right?</p> <p>10 A Look, where did I say in</p> <p>11 these two sentences -- where are the</p> <p>12 words production music library here?</p> <p>13 That the first thing we have to do is</p> <p>14 going from top down not from bottom up.</p> <p>15 Q You're talking about customs</p> <p>16 and practice in the industry, right?</p> <p>17 A Yes.</p> <p>18 Q What industry are you talking</p> <p>19 about?</p> <p>20 A The entire industry. The</p> <p>21 entire record industry. Let's go back</p> <p>22 to what I --</p> <p>23 Q We're not in the record</p> <p>24 industry.</p> <p>25 A This is just a summary. This</p>	<p style="text-align: right;">Page 401</p> <p>1 KOHN</p> <p>2 A I'm sorry. I may have</p> <p>3 misspoke.</p> <p>4 Q PRO is like ASCAP and BMI?</p> <p>5 A PRO is like ASCAP and BMI.</p> <p>6 What I'm --</p> <p>7 Q I see it.</p> <p>8 A -- I'm saying here is it</p> <p>9 would be unfair and unreasonable for</p> <p>10 ASCAP or BMI to distribute income based</p> <p>11 upon the number of songs and their</p> <p>12 respective repertoire because a vast</p> <p>13 number of songs in the catalog, which</p> <p>14 may never be performed, would receive</p> <p>15 the same share of income as frequently</p> <p>16 performed songs.</p> <p>17 Q Now, we're not talking --</p> <p>18 A No, no.</p> <p>19 Q You're still talking. Go</p> <p>20 ahead.</p> <p>21 A I'm still talking.</p> <p>22 Q Please, go ahead.</p> <p>23 A I'm still talking. Because</p> <p>24 we're talking -- because as I said</p> <p>25 customs and practices in the music</p>

<p style="text-align: right;">Page 402</p> <p>1 KOHN</p> <p>2 industry and that applies across the</p> <p>3 board.</p> <p>4 Q The music industry?</p> <p>5 A Yeah. And it includes -- the</p> <p>6 music industry includes the record</p> <p>7 companies, PROs, music publishing</p> <p>8 companies and music production</p> <p>9 libraries or production music</p> <p>10 libraries.</p> <p>11 Q We're talking about sync</p> <p>12 licenses now, aren't we, blanket sync</p> <p>13 licenses?</p> <p>14 A No, we're looking at -- we're</p> <p>15 looking at blanket revenue.</p> <p>16 Q No.</p> <p>17 A Yes, we are. Oh, yes, we</p> <p>18 are.</p> <p>19 Q Yes, we are?</p> <p>20 A Yes, we are. We're looking</p> <p>21 at blanket -- a blanket license is a</p> <p>22 form of license where you -- one of</p> <p>23 your experts would like to use the word</p> <p>24 access. So you have -- we're going to</p> <p>25 reduce your transaction costs, you</p>	<p style="text-align: right;">Page 404</p> <p>1 KOHN</p> <p>2 that have been performed a lot or</p> <p>3 sync'd a lot or used a lot get the same</p> <p>4 amount of money as songs who don't get</p> <p>5 used at all. That is unfair and</p> <p>6 unreasonable. It may be practical</p> <p>7 because it makes your job easier, but</p> <p>8 it's unfair and it's unreasonable.</p> <p>9 That's the music industry. Everyone</p> <p>10 does that. And if you don't do it --</p> <p>11 if you don't do it, you're being unfair</p> <p>12 and you're being unreasonable.</p> <p>13 Q So -- oh, you're still</p> <p>14 talking?</p> <p>15 A Yeah.</p> <p>16 So I have those examples in</p> <p>17 this report on 76. I say it's a common</p> <p>18 practice for record companies to</p> <p>19 allocate blanket income on the basis of</p> <p>20 the most practical means available.</p> <p>21 For example, sometimes a record label</p> <p>22 must pay royalties on what is called</p> <p>23 breakage income. That is, they might</p> <p>24 have received an advance from an</p> <p>25 organization that does streaming from,</p>
<p style="text-align: right;">Page 403</p> <p>1 KOHN</p> <p>2 know, read US versus ASCAP and BMI.</p> <p>3 You know a 1979 Supreme Court case, the</p> <p>4 reason why they don't violate the</p> <p>5 antitrust laws, music publishing</p> <p>6 companies, is because they're reducing</p> <p>7 the transaction cost of their</p> <p>8 customers. That's what a blanket does.</p> <p>9 A -- it's something that's issued in a</p> <p>10 blanket form that you can go ahead and</p> <p>11 use what's here. All right? And</p> <p>12 whenever money is brought in on a</p> <p>13 blanket basis whether it's from a PRO</p> <p>14 issuing for performance licenses,</p> <p>15 whether it's a blanket for</p> <p>16 synchronization licenses, whether it's</p> <p>17 from a record company who's got</p> <p>18 breakage, whether it's from black box</p> <p>19 money that's overseas from music</p> <p>20 publishing companies, you always</p> <p>21 allocate it to the best of your ability</p> <p>22 on a fair and reasonable basis which is</p> <p>23 always based upon usage.</p> <p>24 If you don't base it upon</p> <p>25 usage you're going to have some songs</p>	<p style="text-align: right;">Page 405</p> <p>1 KOHN</p> <p>2 let's say, ten years ago, a company --</p> <p>3 Cue Tracks, it's a company that paid</p> <p>4 millions of dollars to the record</p> <p>5 companies, and they may have gone out</p> <p>6 of business before they even went</p> <p>7 online. All right? So now a record</p> <p>8 company is at advance of let's say 10</p> <p>9 or \$20 million, and how do they</p> <p>10 distribute that money to the artist?</p> <p>11 They have no reports whatsoever. What</p> <p>12 they do is they look at other streaming</p> <p>13 companies, look at the reports that</p> <p>14 they do have, do an extrapolation and</p> <p>15 allocate the money based upon usage.</p> <p>16 They do not allocate the money counting</p> <p>17 the number of recordings that they have</p> <p>18 in their catalog and giving everyone</p> <p>19 the same amount. Okay?</p> <p>20 So that's the record</p> <p>21 industry. And I say here -- and you</p> <p>22 were asking who did I talk to. Well,</p> <p>23 in that particular instance when I was</p> <p>24 in my company at Royalty Share I sat in</p> <p>25 policy discussions at Sony Music, which</p>

<p style="text-align: right;">Page 406</p> <p>1 KOHN</p> <p>2 is a sister company to Sony ATV, and</p> <p>3 that's how they do it. The Sony</p> <p>4 corporation does it that way. That's</p> <p>5 the way it's supposed to be done.</p> <p>6 Now, black box monies is</p> <p>7 monies overseas that music publishers</p> <p>8 receive that do not come accompanied by</p> <p>9 usage reports because it's money that</p> <p>10 was unallocated to anyone specifically.</p> <p>11 The music publisher gets it and an</p> <p>12 honest music publisher will distribute</p> <p>13 that monies -- its portions to the</p> <p>14 other publishers, sub-publisher,</p> <p>15 original publishers or others,</p> <p>16 copublishers and to songwriters on a</p> <p>17 fair and reasonable basis. And that's</p> <p>18 going to be based upon some projected</p> <p>19 usage or if they have the report it</p> <p>20 will be actual usage. And that's the</p> <p>21 way it's done.</p> <p>22 Nobody that I've ever heard</p> <p>23 of, except in the past day I heard of</p> <p>24 First Com, your last -- Mr. Katz said</p> <p>25 that he acquired a company when he was</p>	<p style="text-align: right;">Page 408</p> <p>1 KOHN</p> <p>2 strawman. I said it's based upon</p> <p>3 usage. Adam Taylor agrees it's based</p> <p>4 upon usage. I think anyone who would</p> <p>5 do it on the basis of the number of</p> <p>6 songs -- if ASCAP did it they'd be out</p> <p>7 of business the next day. If record</p> <p>8 companies did it, they'd be sued by</p> <p>9 their recording artists. And if a</p> <p>10 production music company did it to</p> <p>11 their songwriters, they would be sued</p> <p>12 by their -- sued by their songwriters.</p> <p>13 And that's what this case is about.</p> <p>14 Q Okay. Let me know when</p> <p>15 you're done.</p> <p>16 A I'm done.</p> <p>17 Q Okay.</p> <p>18 You talked about custom and</p> <p>19 practice, but the custom and practice</p> <p>20 now you're talking about is the music</p> <p>21 industry generally and not related to</p> <p>22 sync licensing by production music</p> <p>23 libraries; is that right?</p> <p>24 MR. MARDEROSIAN: I'm going</p> <p>25 to object.</p>
<p style="text-align: right;">Page 407</p> <p>1 KOHN</p> <p>2 at Zamba that did it that way. I was</p> <p>3 surprised to hear that. A small</p> <p>4 production music library did it that</p> <p>5 way.</p> <p>6 And then you have your own</p> <p>7 witness, Adam Taylor, he runs a</p> <p>8 production music library; and he does</p> <p>9 it the right way. He basis it on</p> <p>10 usage -- usage reports. Now, all of</p> <p>11 your experts went to great lengths to</p> <p>12 say that I said in my report that it</p> <p>13 has to be done on actual usage. I</p> <p>14 suspect that that someone may have put</p> <p>15 in their heads that I said actual</p> <p>16 usage. But I didn't say that it had to</p> <p>17 be done in actual usage, BMI and ASCAP</p> <p>18 don't do it on actual usage all the</p> <p>19 time. They do get numbers based upon</p> <p>20 electronic usage reports that reflect</p> <p>21 accurate usage pretty well.</p> <p>22 But when your experts set up</p> <p>23 strawman that says that nobody can do</p> <p>24 it in actual usage, that's simply not</p> <p>25 what I said in my report. It's a</p>	<p style="text-align: right;">Page 409</p> <p>1 KOHN</p> <p>2 Mischaracterizes the</p> <p>3 testimony. Argumentative.</p> <p>4 A I am using it as sync</p> <p>5 licenses for a production music</p> <p>6 library. I mentioned Adam Taylor</p> <p>7 two -- how many times did I mention him</p> <p>8 in the past ten minutes? He runs a</p> <p>9 production music library, has admitted</p> <p>10 that his blanket sync licenses, when he</p> <p>11 gets the income -- when he gets his</p> <p>12 income he also gets usage reports to</p> <p>13 find out what songs have been sync'd.</p> <p>14 And he uses some message -- some</p> <p>15 methodology based upon his usage. He</p> <p>16 wasn't specific in his report, but I</p> <p>17 was very happy to hear that he's doing</p> <p>18 it in some. I don't know for sure. I</p> <p>19 haven't seen his calculations, but if</p> <p>20 it's based upon usage, it's likely to</p> <p>21 be more fair and more reasonable than</p> <p>22 basing it upon the number of songs in</p> <p>23 the catalog, which virtually nobody</p> <p>24 does except your client.</p> <p>25 Q You said virtually nobody</p>

<p style="text-align: right;">Page 410</p> <p>1 KOHN</p> <p>2 does. What -- who have you talked to?</p> <p>3 A I don't have to talk to</p> <p>4 everybody in the industry.</p> <p>5 Q You don't have to talk to</p> <p>6 anybody it appears.</p> <p>7 A I --</p> <p>8 MR. MARDEROSIAN: Folks,</p> <p>9 you're arguing with each other.</p> <p>10 Q You haven't identified a</p> <p>11 single --</p> <p>12 COURT REPORTER: Excuse me.</p> <p>13 A I have -- I don't have to --</p> <p>14 Q You haven't identified a</p> <p>15 single production music library that</p> <p>16 you've contacted, spoke to, or found</p> <p>17 out how they do it; is that right?</p> <p>18 A I sat in a deposition -- I'm</p> <p>19 sorry -- in a deposition yesterday. If</p> <p>20 you don't remember, you can get the</p> <p>21 transcript and read it. Right?</p> <p>22 Q I remember it well.</p> <p>23 A His report says usage. He</p> <p>24 was asked specifically whether he</p> <p>25 thought that was fair. Now, this is a</p>	<p style="text-align: right;">Page 412</p> <p>1 KOHN</p> <p>2 Q I don't know what you're</p> <p>3 saying.</p> <p>4 MR. MARDEROSIAN: Hold on.</p> <p>5 Stop.</p> <p>6 He's answered the question.</p> <p>7 You're now arguing with him. Stop</p> <p>8 arguing with him, Don.</p> <p>9 Let's go to the next topic.</p> <p>10 You've got his testimony on the</p> <p>11 subject.</p> <p>12 MR. ZAKARIN: He hasn't</p> <p>13 identified a single production</p> <p>14 music --</p> <p>15 MR. MARDEROSIAN: Incorrect.</p> <p>16 You haven't listened to what</p> <p>17 he said.</p> <p>18 MR. ZAKARIN: I was --</p> <p>19 MR. MARDEROSIAN: You -- save</p> <p>20 it for trial, Don.</p> <p>21 MR. ZAKARIN: No.</p> <p>22 MR. MARDEROSIAN: Save it for</p> <p>23 trial and let's see --</p> <p>24 MR. ZAKARIN: That's not how</p> <p>25 it goes.</p>
<p style="text-align: right;">Page 411</p> <p>1 KOHN</p> <p>2 guy who sat on the board of APM, the</p> <p>3 production music library that your</p> <p>4 other expert is the CEO of.</p> <p>5 Q Um-hum.</p> <p>6 A He circled the wagon saying</p> <p>7 of course it's okay to do this because</p> <p>8 I had a company like that myself that</p> <p>9 that did it.</p> <p>10 Q You didn't answer my</p> <p>11 question.</p> <p>12 A I did answer your question.</p> <p>13 I just told you -- I just told you a</p> <p>14 production music library out of the</p> <p>15 voice of your own experts, two of them,</p> <p>16 okay, are saying that they -- that's</p> <p>17 the way they do it.</p> <p>18 Q I just want to make sure. So</p> <p>19 your testimony about custom and</p> <p>20 practice is now based upon what Paul</p> <p>21 Katz testified to yesterday and what</p> <p>22 Adam Taylor has in his report; is that</p> <p>23 it?</p> <p>24 A That's not what I'm</p> <p>25 testifying. It's not what I said.</p>	<p style="text-align: right;">Page 413</p> <p>1 KOHN</p> <p>2 MR. MARDEROSIAN: -- if the</p> <p>3 jury accepts your argument on</p> <p>4 this.</p> <p>5 MR. ZAKARIN: That's not how</p> <p>6 it goes, Mick. My questions get</p> <p>7 answered, or else I don't leave</p> <p>8 them.</p> <p>9 MR. MARDEROSIAN: His</p> <p>10 question -- he did answer your</p> <p>11 question, you're now just arguing</p> <p>12 it.</p> <p>13 A You just don't like the</p> <p>14 answer to the question.</p> <p>15 Q Well, you -- if you gave an</p> <p>16 answer, I might like it.</p> <p>17 I asked you --</p> <p>18 COURT REPORTER: Excuse me.</p> <p>19 Gentlemen, please.</p> <p>20 MR. MARDEROSIAN: Hold on,</p> <p>21 Don. Give her -- give her a</p> <p>22 moment.</p> <p>23 COURT REPORTER: I just need</p> <p>24 you to speak one at a time,</p> <p>25 please.</p>

<p style="text-align: right;">Page 414</p> <p>1 KOHN</p> <p>2 MR. ZAKARIN: We'll try.</p> <p>3 Q You've talked about custom</p> <p>4 and practice and my question was very</p> <p>5 simple. What production music</p> <p>6 libraries have you ascertained allocate</p> <p>7 blanket license income on any kind of a</p> <p>8 usage basis? We know APM does it on a</p> <p>9 reported usage basis. What else? What</p> <p>10 other production music library</p> <p>11 allocates it, however they allocate it?</p> <p>12 Do you have any information? Any</p> <p>13 information?</p> <p>14 A I suspect that every other</p> <p>15 one does it except your client today</p> <p>16 and maybe First Com if it still exists.</p> <p>17 Q I didn't ask what you</p> <p>18 suspect. I asked what you know, facts.</p> <p>19 A I know the customs and</p> <p>20 practices of the music industry. I</p> <p>21 can't tell you over 20 years of being</p> <p>22 in the industry and discussing with</p> <p>23 people who know what they're -- I may</p> <p>24 have discussed it with Adam Taylor, who</p> <p>25 knows, because we did discuss his</p>	<p style="text-align: right;">Page 416</p> <p>1 KOHN</p> <p>2 about your own experts, Don.</p> <p>3 Q What you haven't talked</p> <p>4 about -- we have Adam Taylor who says</p> <p>5 that they do it on a -- on a reported</p> <p>6 usage basis and that's fine. And Adam</p> <p>7 Taylor says what he says. And it's in</p> <p>8 his report.</p> <p>9 I'm asking you what</p> <p>10 production music libraries do you</p> <p>11 know -- do you know how other</p> <p>12 production music libraries allocate</p> <p>13 blanket license income?</p> <p>14 A Yes, they all do it.</p> <p>15 Q Who?</p> <p>16 A They all do it except</p> <p>17 Extreme. APM is one example of it.</p> <p>18 And over the years --</p> <p>19 Q Give me another examples.</p> <p>20 A Over the years -- I can't</p> <p>21 imagine -- my opinion is it's not fair</p> <p>22 or reasonable.</p> <p>23 Q I didn't ask that. You can</p> <p>24 have that opinion.</p> <p>25 MR. MARDEROSIAN: He told you</p>
<p style="text-align: right;">Page 415</p> <p>1 KOHN</p> <p>2 business when I met with him five, six</p> <p>3 years ago, whenever it was. But I</p> <p>4 learned this over a period of time.</p> <p>5 And it is not fair -- my opinion is</p> <p>6 that it's not fair or reasonable to</p> <p>7 base it upon the number of songs.</p> <p>8 Nobody apparently but your client does</p> <p>9 it. You have not and your experts have</p> <p>10 not pointed to anyone who does it that</p> <p>11 way.</p> <p>12 Q You're the one who's talking</p> <p>13 about custom and practice.</p> <p>14 A Yes.</p> <p>15 Q I'm not. So I want to know</p> <p>16 what the custom and practice is of</p> <p>17 production music libraries allocating</p> <p>18 it. You have a statement --</p> <p>19 A Production.</p> <p>20 Q -- the basis for the</p> <p>21 statement -- you've talked about the</p> <p>22 ASCAP and BMI. You've talked about</p> <p>23 record companies. You've talked about</p> <p>24 black box.</p> <p>25 MR. MARDEROSIAN: He's talked</p>	<p style="text-align: right;">Page 417</p> <p>1 KOHN</p> <p>2 Sony Music, Don. You're leaving</p> <p>3 that out.</p> <p>4 MR. ZAKARIN: Sony Music is</p> <p>5 not a production music library.</p> <p>6 MR. MARDEROSIAN: He told you</p> <p>7 how they handle the publishing in</p> <p>8 regard to those uses.</p> <p>9 MR. ZAKARIN: Black Box. I</p> <p>10 understand black box. That's not</p> <p>11 the question.</p> <p>12 A Yes. The music industry</p> <p>13 allocates money that's presented on a</p> <p>14 blanket basis whether it's the leftover</p> <p>15 advance, whether it's black box money,</p> <p>16 whether it's income. There's no one</p> <p>17 who's going to -- there's no one except</p> <p>18 maybe one of your witnesses yesterday</p> <p>19 who suggested that that might even be</p> <p>20 close to being fair. It's not.</p> <p>21 I don't have to talk to every</p> <p>22 production music library in the world.</p> <p>23 Q Do you have to talk to any?</p> <p>24 A I don't even know all of the</p> <p>25 ones that do it on a blanket basis,</p>

<p style="text-align: right;">Page 418</p> <p>1 KOHN</p> <p>2 okay. Has your expert witnesses</p> <p>3 reported back as to who other -- anyone</p> <p>4 other than First Com that does it? You</p> <p>5 have three -- you have an expert</p> <p>6 witness who is the CEO of one of the</p> <p>7 largest production music libraries in</p> <p>8 the world.</p> <p>9 Q Yes.</p> <p>10 A Your client is the CEO of a</p> <p>11 production music library, one of the</p> <p>12 largest in the world.</p> <p>13 Q Yes.</p> <p>14 A Have either of them suggested</p> <p>15 that anyone other than Extreme does it</p> <p>16 this way? What do they say?</p> <p>17 Q Are you aware of how many</p> <p>18 production music library --</p> <p>19 A I didn't see that.</p> <p>20 Q Are you aware of how many</p> <p>21 production music libraries there are in</p> <p>22 the United States?</p> <p>23 A How many? The number?</p> <p>24 Q Yeah.</p> <p>25 A No. It must be a large</p>	<p style="text-align: right;">Page 420</p> <p>1 KOHN</p> <p>2 Q Have you done a survey of any</p> <p>3 production --</p> <p>4 A Yeah, I did a survey.</p> <p>5 Q Of the production music</p> <p>6 library?</p> <p>7 COURT REPORTER: Excuse me.</p> <p>8 Gentlemen, please.</p> <p>9 MR. MARDEROSIAN: You're just</p> <p>10 arguing.</p> <p>11 MR. ZAKARIN: I just want to</p> <p>12 know the source.</p> <p>13 A I haven't been -- I haven't</p> <p>14 been asked to do a survey and nor have</p> <p>15 any of your experts come forth with</p> <p>16 anybody else.</p> <p>17 Q So you haven't done a</p> <p>18 survey --</p> <p>19 A Nor has your client.</p> <p>20 COURT REPORTER: Excuse me.</p> <p>21 I'm going to need to take a break.</p> <p>22 MR. ZAKARIN: I know. I'm</p> <p>23 sorry. I'm asking questions, and</p> <p>24 he's actually answering on top of</p> <p>25 my questions.</p>
<p style="text-align: right;">Page 419</p> <p>1 KOHN</p> <p>2 number.</p> <p>3 Q And with the exception of</p> <p>4 Adam Taylor's testimony in his report</p> <p>5 about on a reported usage basis, do you</p> <p>6 know how any of them -- any of these</p> <p>7 many numbered production music</p> <p>8 libraries allocate blanket license</p> <p>9 income? Do you know how any of them do</p> <p>10 it?</p> <p>11 A Yes, they do it on a usage</p> <p>12 basis.</p> <p>13 Q And what's the basis for your</p> <p>14 statement that they do it on a usage</p> <p>15 basis?</p> <p>16 A Because everybody does it</p> <p>17 that way in the business except your</p> <p>18 client.</p> <p>19 Q So this is just a conclusion.</p> <p>20 It's not based upon your knowledge of</p> <p>21 any facts, right?</p> <p>22 MR. MARDEROSIAN: You're</p> <p>23 arguing with him. You're arguing</p> <p>24 with him. He's answered your</p> <p>25 question.</p>	<p style="text-align: right;">Page 421</p> <p>1 KOHN</p> <p>2 Q You haven't done a survey,</p> <p>3 right? I'm not saying you were asked</p> <p>4 to --</p> <p>5 A I have not done a</p> <p>6 questionnaires kind of survey.</p> <p>7 Q And you haven't done a census</p> <p>8 or questioned any executives of any</p> <p>9 production music library about how do</p> <p>10 they allocate their blanket license</p> <p>11 income; is that right? Yes or no?</p> <p>12 A In the -- since the start of</p> <p>13 this case, no, for sure.</p> <p>14 Q And you didn't ask them</p> <p>15 before the start of this case, did you?</p> <p>16 A I might have.</p> <p>17 Q But you don't recall whether</p> <p>18 you did?</p> <p>19 A I don't recall.</p> <p>20 Q Okay.</p> <p>21 A How did I come to this</p> <p>22 knowledge? I can't remember who I</p> <p>23 may -- might have talked to in the</p> <p>24 1990s in researching the book.</p> <p>25 Q I understand.</p>

<p style="text-align: right;">Page 422</p> <p>1 KOHN</p> <p>2 But it's your opinion,</p> <p>3 nonetheless, that it's custom and</p> <p>4 practice to allocate it. So it's now</p> <p>5 not on an actual usage basis. It's on</p> <p>6 some usage basis?</p> <p>7 A You used the word actual</p> <p>8 usage, I didn't. I used the word</p> <p>9 usage. And you keep doing that. Your</p> <p>10 experts keep doing that.</p> <p>11 It was a strawman. It was</p> <p>12 ridiculous for them to go on pages</p> <p>13 after pages and say that nobody does it</p> <p>14 on actual usage when they know that</p> <p>15 everybody does it on usage. And that</p> <p>16 was ridiculous. They look like fools.</p> <p>17 Q Well, that's your opinion</p> <p>18 which is another good opinion.</p> <p>19 So it's a usage basis now.</p> <p>20 It's not actual -- it's some sort of</p> <p>21 usage basis. That's your testimony?</p> <p>22 A That's correct.</p> <p>23 Q Okay.</p> <p>24 A Some usage basis or projected</p> <p>25 usage basis. And those are the words</p>	<p style="text-align: right;">Page 424</p> <p>1 KOHN</p> <p>2 a fair, reasonable, practical basis.</p> <p>3 Q I know that. And then it</p> <p>4 says there after that, such basis to be</p> <p>5 determined in company and the HM</p> <p>6 transferee's sole discretion, right?</p> <p>7 A Yes.</p> <p>8 Q You understand what sole</p> <p>9 discretion means?</p> <p>10 MR. MARDEROSIAN: Objection.</p> <p>11 Vague.</p> <p>12 A I understand what the word</p> <p>13 fair and reasonable and practical basis</p> <p>14 means. I know that when a contract,</p> <p>15 whether it has sole discretion or not,</p> <p>16 it is going to be subject to an implied</p> <p>17 obligation of good faith and fair</p> <p>18 dealing.</p> <p>19 Sole discretion doesn't mean</p> <p>20 they can ignore what's in that</p> <p>21 paragraph. They wouldn't have been</p> <p>22 able to -- why didn't they just simply</p> <p>23 say they can agree to apportion the</p> <p>24 licensing income on their sole</p> <p>25 discretion, period? They didn't do</p>
<p style="text-align: right;">Page 423</p> <p>1 KOHN</p> <p>2 that were used in the contract. I</p> <p>3 assume that's what you're moving to</p> <p>4 next.</p> <p>5 Q Yes. Yes, we are.</p> <p>6 Excellent.</p> <p>7 Let's pull out Exhibit 3, I</p> <p>8 think it is. I think it's</p> <p>9 Paragraph 7.3.</p> <p>10 A It is.</p> <p>11 Q Now, what it says, I think --</p> <p>12 let's see if I can recall your quote</p> <p>13 from the contract. Top of Page 12,</p> <p>14 your quote from the contract says the</p> <p>15 2011 composer agreement states that the</p> <p>16 determination or apportion of the</p> <p>17 relevant share is to be made on a fair,</p> <p>18 reasonable and practical basis, right?</p> <p>19 A Right.</p> <p>20 Q And actually that's not the</p> <p>21 complete quote, is it?</p> <p>22 A This is a summary of the</p> <p>23 quote.</p> <p>24 Q The real quote says --</p> <p>25 A The only part I quoted was on</p>	<p style="text-align: right;">Page 425</p> <p>1 KOHN</p> <p>2 that.</p> <p>3 Q I agree.</p> <p>4 A Right? They led the person</p> <p>5 who was reading this contract, the</p> <p>6 person who didn't draft the contract,</p> <p>7 two young songwriters signed a contract</p> <p>8 because they're reading words like</p> <p>9 fair, reasonable and practical. Anyone</p> <p>10 would read it what way. And then it</p> <p>11 says without prejudice to the</p> <p>12 generality of the foregoing company and</p> <p>13 HM transferees reserves the right to</p> <p>14 apportion the licensing income, the</p> <p>15 blanket licensing income on the ways</p> <p>16 that are standard with the customs and</p> <p>17 practices of the music industry.</p> <p>18 Any -- on any actual usage basis</p> <p>19 determined by company. On any</p> <p>20 projected usage basis determined by</p> <p>21 company or on a basis which is a</p> <p>22 composite of the methods described</p> <p>23 above. It doesn't have a D that says</p> <p>24 or none of the above. All right?</p> <p>25 Q Reserves the right --</p>

<p style="text-align: right;">Page 426</p> <p>1 KOHN</p> <p>2 A Anyone reading this paragraph</p> <p>3 is going to not be able -- not use the</p> <p>4 word sole discretion to wipe out</p> <p>5 everything else that's in it. You know</p> <p>6 that very well. If you are on my side</p> <p>7 of the table, you would be agreeing</p> <p>8 with me a thousand percent.</p> <p>9 Q Don't be so sure.</p> <p>10 A Yes, you would.</p> <p>11 Q Sole discretion is to make</p> <p>12 the determination that is fair,</p> <p>13 reasonable, and practical. I agree</p> <p>14 with that.</p> <p>15 MR. MARDEROSIAN: I'm going</p> <p>16 to object that it's calling for a</p> <p>17 legal opinion and conclusion.</p> <p>18 A So you're saying that -- if</p> <p>19 that was a question, that the word sole</p> <p>20 discretion cannot be read in the</p> <p>21 context -- it can only be read in the</p> <p>22 context of fair, reasonable and</p> <p>23 practical. But it can't be read in the</p> <p>24 context --</p> <p>25 COURT REPORTER: Sir, I'm</p>	<p style="text-align: right;">Page 428</p> <p>1 KOHN</p> <p>2 is vague and ambiguous and an</p> <p>3 incomplete hypothetical.</p> <p>4 And it's been asked and</p> <p>5 already answered.</p> <p>6 A If -- then why -- if they</p> <p>7 were going to allocate it on the basis</p> <p>8 of the number of songs, why didn't it</p> <p>9 say without prejudice of the generality</p> <p>10 of the foregoing company reserves the</p> <p>11 right to apportion it based upon the</p> <p>12 number of songs? Because if somebody</p> <p>13 read that in the contract, they'd say</p> <p>14 I'm not signing this contract. There's</p> <p>15 no way I'm going to have them increase</p> <p>16 the size of the catalog and reduce the</p> <p>17 amount of money I'm getting for my</p> <p>18 songs regardless of how popular they</p> <p>19 are.</p> <p>20 They were already told by</p> <p>21 that point that they were producing for</p> <p>22 them some of the best songs they've</p> <p>23 got, some of the ones that -- that's</p> <p>24 why they signed them up to this</p> <p>25 contract to begin with.</p>
<p style="text-align: right;">Page 427</p> <p>1 KOHN</p> <p>2 really going to ask you to slow</p> <p>3 down. It's getting late. The</p> <p>4 context of fair and reasonable and</p> <p>5 practical.</p> <p>6 A That you're suggesting that</p> <p>7 sole discretion is going to -- I forgot</p> <p>8 our train of thought -- given the court</p> <p>9 reporter had trouble saying what I</p> <p>10 said, I lost my train of thought.</p> <p>11 Q All I'm saying is that the</p> <p>12 general proposition is they're entitled</p> <p>13 to allocate blanket license income in a</p> <p>14 fair, reasonable, practical method the</p> <p>15 basis of which they could determine in</p> <p>16 their sole discretion. And they</p> <p>17 reserve the right without prejudice to</p> <p>18 that sole discretion to do so in a</p> <p>19 fair, reasonable and practical basis.</p> <p>20 They reserve the right to do it in</p> <p>21 these other methods.</p> <p>22 MR. MARDEROSIAN: I'm going</p> <p>23 to object.</p> <p>24 The question is calling for a</p> <p>25 legal opinion and conclusion. And</p>	<p style="text-align: right;">Page 429</p> <p>1 KOHN</p> <p>2 No, I would not -- it is not</p> <p>3 my opinion to interpret this contract</p> <p>4 as basically making the words after</p> <p>5 without prejudice to the generality of</p> <p>6 foregoing, make the words -- all those</p> <p>7 words completely meaningless. They</p> <p>8 have all the meaning in the world</p> <p>9 because they're perfectly consistent</p> <p>10 with music industry, custom and</p> <p>11 practice.</p> <p>12 Q So it's your view that these</p> <p>13 A, B, and C are requirements as opposed</p> <p>14 to simply reserving the right to use</p> <p>15 those methods?</p> <p>16 MR. MARDEROSIAN: I'm going</p> <p>17 to object. It's calling for a</p> <p>18 legal opinion and conclusion.</p> <p>19 It's vague and ambiguous.</p> <p>20 Incomplete hypothetical.</p> <p>21 A They provide as Justice</p> <p>22 Cardozo said, and I forgot his words,</p> <p>23 the -- he doesn't use the word context,</p> <p>24 but fair, reasonable and practical,</p> <p>25 okay, are focused or modified or are</p>

<p style="text-align: right;">Page 430</p> <p>1 KOHN</p> <p>2 given meaning by A, B, and C. It</p> <p>3 doesn't say it has to be an actual</p> <p>4 usage, and I've never said it had to</p> <p>5 be. I mean actual usage in the way</p> <p>6 your experts said it had to be perfect,</p> <p>7 it would have to be based upon, you</p> <p>8 know, electronic evidence recorded in</p> <p>9 realtime, whatever actual is in their</p> <p>10 minds. But it does say projected usage</p> <p>11 and it does say a composite of the two.</p> <p>12 That is what gives meaning to fair,</p> <p>13 reasonable and practical.</p> <p>14 Sole discretion means it's</p> <p>15 going to be within the realm of fair,</p> <p>16 reasonable and practical on a usage</p> <p>17 basis. Look, if you don't have the</p> <p>18 reports just like, I assume Adam Taylor</p> <p>19 does if a report goes missing, they're</p> <p>20 going to base -- I've seen -- I don't</p> <p>21 know where I've seen it. I've seen</p> <p>22 production music library contracts, and</p> <p>23 I'm going to have to go through my file</p> <p>24 to find it because it would be in</p> <p>25 storage, I have seen production music</p>	<p style="text-align: right;">Page 432</p> <p>1 KOHN</p> <p>2 Q Let's turn back -- let's deal</p> <p>3 with the blanket licensing allocations.</p> <p>4 You agree with me when a</p> <p>5 blanket license is issued, a blanket</p> <p>6 sync license is issued, the licensor</p> <p>7 doesn't know what works in its library</p> <p>8 will be used; is that right?</p> <p>9 MR. MARDEROSIAN: I'm going</p> <p>10 to object.</p> <p>11 That's an incomplete</p> <p>12 hypothetical.</p> <p>13 Q You can answer the question.</p> <p>14 MR. MARDEROSIAN: And it's</p> <p>15 vague and ambiguous.</p> <p>16 And it doesn't apply to the</p> <p>17 facts of this case.</p> <p>18 Q You can answer the question.</p> <p>19 A Even though a blanket sync</p> <p>20 license may use that title on the top</p> <p>21 of a document to describe what's</p> <p>22 basically in it, what's happening is a</p> <p>23 series of sync licenses, okay, are</p> <p>24 being issued on a blanket -- on a -- a</p> <p>25 catalog is being offered in which</p>
<p style="text-align: right;">Page 431</p> <p>1 KOHN</p> <p>2 library contracts that have blanket</p> <p>3 synchronization licenses in it and it</p> <p>4 says exactly the detail of what</p> <p>5 projected usage is. That if we don't</p> <p>6 have an actual report we can use what's</p> <p>7 otherwise available to approximate what</p> <p>8 the usage would have been. And that's</p> <p>9 the sole discretion that they have to</p> <p>10 do.</p> <p>11 You follow me?</p> <p>12 Q I understand what you're</p> <p>13 saying.</p> <p>14 A That's what it is.</p> <p>15 Q Okay.</p> <p>16 That's your view.</p> <p>17 A Right. Right.</p> <p>18 Q And you've now parsed the</p> <p>19 agreement the way you read the</p> <p>20 agreement, correct?</p> <p>21 MR. MARDEROSIAN: Well, it's</p> <p>22 argumentative and it's calling for</p> <p>23 a legal opinion and conclusion.</p> <p>24 He's answered the question</p> <p>25 and given you his opinion.</p>	<p style="text-align: right;">Page 433</p> <p>1 KOHN</p> <p>2 someone can choose which songs in which</p> <p>3 to sync into audio visual works and</p> <p>4 that is what is being licensed.</p> <p>5 Q Any or all --</p> <p>6 A Any -- well --</p> <p>7 MR. MARDEROSIAN: Excuse me.</p> <p>8 We're stopping. You're</p> <p>9 interrupting him again, Don.</p> <p>10 MR. ZAKARIN: I apologize.</p> <p>11 MR. MARDEROSIAN: We can't do</p> <p>12 that.</p> <p>13 Q I apologize if I was</p> <p>14 interrupting.</p> <p>15 A And I apologize for all the</p> <p>16 times I interrupted you.</p> <p>17 MR. MARDEROSIAN: Let's take</p> <p>18 a breath here.</p> <p>19 THE WITNESS: Okay.</p> <p>20 Q Go ahead.</p> <p>21 A Could you state the question</p> <p>22 again? Well, now I've lost my train of</p> <p>23 thought.</p> <p>24 Q I'll help you.</p> <p>25 What I said was on the</p>

<p style="text-align: right;">Page 450</p> <p>1 KOHN</p> <p>2 BMI and ASCAP to make it a more rapid</p> <p>3 process, I suppose.</p> <p>4 Q Do you have any familiarity</p> <p>5 with the finances of production music</p> <p>6 libraries?</p> <p>7 MR. MARDEROSIAN: Objection.</p> <p>8 Vague. Overbroad.</p> <p>9 Q You can answer the question.</p> <p>10 A No, I don't have any -- other</p> <p>11 than the testimony that I've been able</p> <p>12 to provide and the expertise that I</p> <p>13 have about customs and practices. No,</p> <p>14 I don't have -- when you say finances</p> <p>15 I'm thinking of balance sheet income</p> <p>16 statement --</p> <p>17 Q Yeah.</p> <p>18 A -- cash flow, things like</p> <p>19 that.</p> <p>20 Q Yes.</p> <p>21 A No.</p> <p>22 Q We're talking the same</p> <p>23 language.</p> <p>24 A Right. No. Nor have I been</p> <p>25 asked to opine on any of that.</p>	<p style="text-align: right;">Page 452</p> <p>1 KOHN</p> <p>2 A He wasn't terribly specific,</p> <p>3 no.</p> <p>4 Q Okay. You understand, don't</p> <p>5 you, that if usage is not reported to</p> <p>6 them, then they don't pay anybody</p> <p>7 who's -- for which they don't get</p> <p>8 reports?</p> <p>9 A Well, maybe they'll get sued</p> <p>10 too. Because most production music</p> <p>11 libraries, my understanding of the</p> <p>12 customs and practices in the business</p> <p>13 and from agreements that I've seen in</p> <p>14 the past is that when you don't get a</p> <p>15 usage report you do allocate the money</p> <p>16 on some projected basis based upon the</p> <p>17 usage reports that you do get.</p> <p>18 Q When you say from your</p> <p>19 understanding, you're talking -- we've</p> <p>20 already covered that. So I'll skip</p> <p>21 that. We covered that pretty well.</p> <p>22 A Thank you.</p> <p>23 (Whereupon, a brief recess</p> <p>24 was taken.)</p> <p>25 Q On Page 14 of your report,</p>
<p style="text-align: right;">Page 451</p> <p>1 KOHN</p> <p>2 Q I understand.</p> <p>3 Do you have any understanding</p> <p>4 how much a usage apportionment approach</p> <p>5 might cost a production music library</p> <p>6 to implement?</p> <p>7 A Depends upon the</p> <p>8 circumstances. Apparently APM uses</p> <p>9 usage reports; and they seem to find it</p> <p>10 not burdensome, otherwise why would</p> <p>11 they do that.</p> <p>12 Q You're aware --</p> <p>13 A Well, they would do it for</p> <p>14 obligations for -- contractual</p> <p>15 obligations perhaps.</p> <p>16 Q You're aware from having read</p> <p>17 Adam Taylor's report that his view of</p> <p>18 the reported usage method is that a lot</p> <p>19 of people whose works are used actually</p> <p>20 don't get paid?</p> <p>21 A I don't recall reading that</p> <p>22 in the report.</p> <p>23 Q Well, on the reported usage</p> <p>24 basis -- do you understand what APM's</p> <p>25 reported usage basis is?</p>	<p style="text-align: right;">Page 453</p> <p>1 KOHN</p> <p>2 I'll ask you to turn there, you say</p> <p>3 Viacom Extreme's issuance of direct</p> <p>4 reproduction of public performance</p> <p>5 licenses to Viacom for just one dollar</p> <p>6 was a violation of the composer -- Aron</p> <p>7 and Robert's composer agreements. And</p> <p>8 on Page 83 of your report you address</p> <p>9 that again. On Page 83 you say, and</p> <p>10 there's even a caption on it, Viacom</p> <p>11 Extreme's secret issuance of direct</p> <p>12 reproduction and public performance</p> <p>13 licenses to Viacom for just one dollar</p> <p>14 was a violation of Aron and Robert's</p> <p>15 composer agreements.</p> <p>16 Then you say that it appears</p> <p>17 that Viacom Extreme joint venture</p> <p>18 actually granted back to Viacom not</p> <p>19 only a blanket reproduction license but</p> <p>20 a blanket direct public performance</p> <p>21 license to all of Viacom's broadcasters</p> <p>22 and producers. And then it continues</p> <p>23 on and names a number of them.</p> <p>24 And on Page 84 you say</p> <p>25 that -- you say it again, thus it</p>

<p style="text-align: right;">Page 466</p> <p>1 KOHN</p> <p>2 A Well, these are unique -- no,</p> <p>3 no, no. When I did -- no, no, no.</p> <p>4 When I did the looking at TuneSat I</p> <p>5 eliminated -- I filtered out everything</p> <p>6 that was not a Bayhem song. There were</p> <p>7 only Bayhem songs in my 16,000.</p> <p>8 Q I understand.</p> <p>9 A And presumably on the 23 --</p> <p>10 21,000.</p> <p>11 Q There was only Bayhem songs</p> <p>12 in yours?</p> <p>13 A Only Bayhem songs. Yeah, I</p> <p>14 filtered everything else out. I</p> <p>15 didn't -- I -- of course I did. Why</p> <p>16 would I include Lonely Orchard stuff</p> <p>17 with stuff that's only involved in this</p> <p>18 case?</p> <p>19 Q Well, apparently, Karen</p> <p>20 Rodriguez didn't filter it out.</p> <p>21 A Well --</p> <p>22 MR. MARDEROSIAN: Hold on.</p> <p>23 Hold on.</p> <p>24 A -- you'll have to -- you ask</p> <p>25 her.</p>	<p style="text-align: right;">Page 468</p> <p>1 KOHN</p> <p>2 A Generally. I haven't read</p> <p>3 them in years.</p> <p>4 Q Sadly, I have much more</p> <p>5 familiarity I think.</p> <p>6 But you're aware generally</p> <p>7 that they preclude publishers and</p> <p>8 writers from granting ASCAP and BMI</p> <p>9 exclusive public performance rights,</p> <p>10 aren't you?</p> <p>11 A So what?</p> <p>12 Q So what? I didn't ask you so</p> <p>13 what. I asked you whether you're aware</p> <p>14 of that?</p> <p>15 A They -- it doesn't preclude</p> <p>16 the music publishers from granting it.</p> <p>17 Q It actually requires that</p> <p>18 music publishers can't grant exclusive</p> <p>19 rights to ASCAP and BMI. They have to</p> <p>20 be --</p> <p>21 A That's right. That's right.</p> <p>22 They have to reserve the right. It's a</p> <p>23 non-exclusive basis so they have to</p> <p>24 reserve the right to issue direct</p> <p>25 blanket performance licenses. I saw</p>
<p style="text-align: right;">Page 467</p> <p>1 KOHN</p> <p>2 MR. MARDEROSIAN: That's</p> <p>3 argumentative. Assumes facts not</p> <p>4 in evidence and mischaracterizes</p> <p>5 the evidence.</p> <p>6 MR. ZAKARIN: Except that</p> <p>7 it's true.</p> <p>8 A You'll have to --</p> <p>9 MR. MARDEROSIAN: It's not</p> <p>10 true.</p> <p>11 A Well, the number is either</p> <p>12 going to be 16,000 or it's going to be</p> <p>13 21,000 or something in between. You</p> <p>14 know, there's a correct number.</p> <p>15 Q How many of them -- of those</p> <p>16 16,000 are Viacom, if you know?</p> <p>17 A I didn't do that filter.</p> <p>18 Q Because we didn't add up --</p> <p>19 and this came from Karen Rodriguez</p> <p>20 anyway, right?</p> <p>21 A Yes.</p> <p>22 Q So we'll skip that.</p> <p>23 You're aware of the BMI --</p> <p>24 excuse me, ASCAP consent decrees,</p> <p>25 aren't you?</p>	<p style="text-align: right;">Page 469</p> <p>1 KOHN</p> <p>2 that in Barry's report.</p> <p>3 Q You knew it beforehand,</p> <p>4 didn't you?</p> <p>5 A Yes.</p> <p>6 Q And broadcasters are also</p> <p>7 fully aware of it, aren't they?</p> <p>8 A Yes.</p> <p>9 Q And you're aware, aren't you,</p> <p>10 that broadcasters -- a number of</p> <p>11 broadcasters will demand direct</p> <p>12 performance licenses?</p> <p>13 A Yes, they will.</p> <p>14 Q Okay.</p> <p>15 A When they can get it.</p> <p>16 Q You can say no, but you can</p> <p>17 also lose the license if you say no;</p> <p>18 isn't that right?</p> <p>19 A That's correct.</p> <p>20 Q Okay.</p> <p>21 A Sometimes they need to have</p> <p>22 the music they need to have and --</p> <p>23 Q Well, need to have the music</p> <p>24 they need to have is more frequent with</p> <p>25 popular music library -- popular music</p>

<p style="text-align: right;">Page 470</p> <p>1 KOHN</p> <p>2 publishers rather than production music</p> <p>3 libraries, wouldn't you agree?</p> <p>4 A I wouldn't necessarily put it</p> <p>5 that way. But I think the way you've</p> <p>6 put it is that production music</p> <p>7 libraries have been more amenable to</p> <p>8 granting direct public performance</p> <p>9 licenses than commercial -- what your</p> <p>10 client called -- other kinds of music</p> <p>11 publishers, traditional music</p> <p>12 publishers.</p> <p>13 Q Traditional music publishers</p> <p>14 have evergreens and must-haves as</p> <p>15 opposed to more generic music?</p> <p>16 A Right. Because -- because</p> <p>17 production music libraries have this --</p> <p>18 it's not because the music is any</p> <p>19 worse.</p> <p>20 Q No, nobody is saying quality.</p> <p>21 A But they also have the</p> <p>22 ability to grant the sound recording at</p> <p>23 the same time, and that gives them</p> <p>24 their special advantage.</p> <p>25 Q But they typically don't have</p>	<p style="text-align: right;">Page 472</p> <p>1 KOHN</p> <p>2 experts had quoted a consent decree in</p> <p>3 connection with their argue. That it</p> <p>4 was okay not to use a usage basis in</p> <p>5 their allocation. Yes, they did. And</p> <p>6 I thought that was -- that was</p> <p>7 incorrect.</p> <p>8 Q I don't think that they say</p> <p>9 that, but they say what they say. So</p> <p>10 we don't have to debate it between you</p> <p>11 and I. I think the simple point that</p> <p>12 we're just trying to make is that the</p> <p>13 consent decrees make it impossible for</p> <p>14 ASCAP and BMI at least to have</p> <p>15 exclusive licensing rights and</p> <p>16 performance rights. They can't have it</p> <p>17 exclusively.</p> <p>18 A Yes.</p> <p>19 Q And broadcasters know that</p> <p>20 and --</p> <p>21 A We've already been through</p> <p>22 this, right?</p> <p>23 Q So we agree.</p> <p>24 It's not your contention, is</p> <p>25 it, I just want to make sure, that if a</p>
<p style="text-align: right;">Page 471</p> <p>1 KOHN</p> <p>2 must-have works or evergreen works.</p> <p>3 They have genres that are used by</p> <p>4 broadcasters.</p> <p>5 A Sure.</p> <p>6 Q And popular music is just --</p> <p>7 costs much more and you have much more,</p> <p>8 if you excuse, me F-U power when you</p> <p>9 have popular music?</p> <p>10 A Sure.</p> <p>11 Q I didn't think that it was</p> <p>12 controversial.</p> <p>13 A I don't think so either. But</p> <p>14 you can't -- you can't jump to the</p> <p>15 conclusion just because the consent</p> <p>16 decrees say that publishers can issue</p> <p>17 direct licenses, that a publisher will</p> <p>18 issue a direct license and then not</p> <p>19 allocate the money coming back</p> <p>20 properly.</p> <p>21 Q But I'm not dealing with</p> <p>22 allocation. I'm only dealing with,</p> <p>23 right now --</p> <p>24 A But the way, one of your</p> <p>25 experts had used -- I think two of your</p>	<p style="text-align: right;">Page 473</p> <p>1 KOHN</p> <p>2 broadcaster, CNN, I think there are a</p> <p>3 couple of others, came to Extreme and</p> <p>4 said we want to license, we want a</p> <p>5 direct performance license. It's not</p> <p>6 your contention that Extreme should</p> <p>7 have rejected that and potentially lost</p> <p>8 the license, is it?</p> <p>9 MR. MARDEROSIAN: Objection.</p> <p>10 Incomplete hypothetical.</p> <p>11 Calls for speculation.</p> <p>12 Q Let me rephrase it. Let me</p> <p>13 rephrase it.</p> <p>14 A Okay.</p> <p>15 Q It's not your contention, is</p> <p>16 it, that if a broadcaster, whether it</p> <p>17 was CNN or another broadcaster said</p> <p>18 we're willing to enter into a blanket</p> <p>19 license with you but only if you grant</p> <p>20 us also a direct performance right,</p> <p>21 that Extreme should have simply said</p> <p>22 no, we won't do it?</p> <p>23 A If Extreme is not prepared to</p> <p>24 do the work necessary to comply with</p> <p>25 its contracts with songwriters to</p>

<p style="text-align: right;">Page 478</p> <p>1 KOHN</p> <p>2 hypothetical and vague.</p> <p>3 A I'm not going to get -- so,</p> <p>4 you know, you'll take my answer and</p> <p>5 take it out of context. Because we</p> <p>6 just had a colloquy here among several</p> <p>7 things.</p> <p>8 So to state the complete</p> <p>9 hypothetical, and that is, a</p> <p>10 broadcaster goes to a copyright owner</p> <p>11 and wants to have a sync license</p> <p>12 coupled with a direct public</p> <p>13 performance license for a particular</p> <p>14 song and recording with that song,</p> <p>15 right?</p> <p>16 Q Comes to the production music</p> <p>17 library, yes.</p> <p>18 A Right. And let's say there's</p> <p>19 one or two songwriters who on the back</p> <p>20 end will be allocated their, let's say</p> <p>21 it's 50 percent of the license fee.</p> <p>22 Q Um-hum.</p> <p>23 A I don't see any issue on the</p> <p>24 allocation side. We know what the</p> <p>25 usage is. It's going to be -- the</p>	<p style="text-align: right;">Page 480</p> <p>1 KOHN</p> <p>2 Viacom Extreme with third party</p> <p>3 licensees for the use of Aron and</p> <p>4 Robert's music in commercial</p> <p>5 advertising, it's my opinion that Aron</p> <p>6 and Robert are entitled to the total</p> <p>7 sum of 987,500 which represents their</p> <p>8 50 percent share of the market value of</p> <p>9 the licenses. Right?</p> <p>10 A I'm looking at page --</p> <p>11 remember, whatever these bullets did, I</p> <p>12 did what I could at the very end to</p> <p>13 summarize this so that the reader could</p> <p>14 see.</p> <p>15 Q I know.</p> <p>16 A So they're kind of like</p> <p>17 headlines and things. So Page 85 is</p> <p>18 where I talk about that.</p> <p>19 Q Yes.</p> <p>20 A So why don't we just go</p> <p>21 there?</p> <p>22 Q Well -- okay. 85, here you</p> <p>23 say it's for TV commercials and other</p> <p>24 promotional uses. That's what you say</p> <p>25 in the middle of the page?</p>
<p style="text-align: right;">Page 479</p> <p>1 KOHN</p> <p>2 contract is going to say you're allowed</p> <p>3 to use it in one episode or ten</p> <p>4 episodes, or you can use it in as many</p> <p>5 episodes as you want during the year,</p> <p>6 you could do whatever basis it is.</p> <p>7 Q It's not a blanket. It's not</p> <p>8 a blanket.</p> <p>9 A Right. It's a discreet</p> <p>10 license.</p> <p>11 Q I agree.</p> <p>12 A Of course they have -- the</p> <p>13 copyright owner has the right to do</p> <p>14 that.</p> <p>15 Q Okay. I just wanted to make</p> <p>16 sure.</p> <p>17 Turn again, if you would --</p> <p>18 first of all, turn to Page 14 of your</p> <p>19 opinion again, if you would.</p> <p>20 This is the second to last</p> <p>21 bullet point on 14. We're referring</p> <p>22 really to your Exhibit A again, okay?</p> <p>23 And it says with respect to a fair and</p> <p>24 reasonable market value for the body of</p> <p>25 the sync licenses as negotiated by</p>	<p style="text-align: right;">Page 481</p> <p>1 KOHN</p> <p>2 A Right.</p> <p>3 Q The bullet point only talks</p> <p>4 about commercial advertising?</p> <p>5 A Well, that's what I said. It</p> <p>6 was meant to be a summary. It may not</p> <p>7 be a accurate summary. It was done at</p> <p>8 the very last minute to try to</p> <p>9 facilitate people understanding where</p> <p>10 the document's going. It was a long</p> <p>11 document and I figured I'd try to do</p> <p>12 the best I can to give you a guideline.</p> <p>13 Even quoting it like it's the gospel</p> <p>14 and, as you just found out, it's not</p> <p>15 the gospel. The gospel is in the body</p> <p>16 of the agreement, I mean the body of</p> <p>17 the report.</p> <p>18 Q I view the entire report as</p> <p>19 the body of the report, but that's</p> <p>20 helpful.</p> <p>21 So you're agreeing then that</p> <p>22 it's not merely on Exhibit A commercial</p> <p>23 licenses. There's promos, there's</p> <p>24 trailers?</p> <p>25 A Various things.</p>

<p style="text-align: right;">Page 482</p> <p>1 KOHN</p> <p>2 Q There's a number of things.</p> <p>3 And I think you've already testified</p> <p>4 that essentially the values were</p> <p>5 provided to you by Aron and Robert and</p> <p>6 you assessed them?</p> <p>7 A Correct. The copyright owner</p> <p>8 or any property owners are aloud to</p> <p>9 make their own assessment as to the</p> <p>10 value of their own property.</p> <p>11 Q Right. Subject to the</p> <p>12 contract, but --</p> <p>13 A Right.</p> <p>14 Q Let's talk about this for a</p> <p>15 little bit.</p> <p>16 They provided you with some</p> <p>17 licenses that they had entered into,</p> <p>18 correct?</p> <p>19 A Yes.</p> <p>20 Q Did they provide you any of</p> <p>21 their gratis licenses to look at?</p> <p>22 A No.</p> <p>23 Q So they selected the licenses</p> <p>24 that they wanted to show you?</p> <p>25 MR. MARDEROSIAN: Only if you</p>	<p style="text-align: right;">Page 484</p> <p>1 KOHN</p> <p>2 A I do remember that.</p> <p>3 Q Okay.</p> <p>4 So other than looking at</p> <p>5 these 10 or 15 licenses, did you do any</p> <p>6 other kind of a survey in order to come</p> <p>7 up with the values that you thought</p> <p>8 were fair and reasonable?</p> <p>9 A I have done surveys. Not</p> <p>10 written surveys, but surveys over the</p> <p>11 past 20 years which I've kept up to</p> <p>12 date in terms of what are reasonable</p> <p>13 license fees for the use of music in</p> <p>14 commercials and theatricals and</p> <p>15 television programming. I summarize</p> <p>16 that or I try to keep it up to date in</p> <p>17 the 26 chapter of Kohn Music Licensing.</p> <p>18 And so -- yeah, so I didn't</p> <p>19 do anything beyond all the accumulated</p> <p>20 knowledge that I've had over the years</p> <p>21 in talking to people and talking to as</p> <p>22 a -- I feel like in a way I'm like a</p> <p>23 reporter talking to various people in</p> <p>24 the industry. I might know more than</p> <p>25 any individual at any particular music</p>
<p style="text-align: right;">Page 483</p> <p>1 KOHN</p> <p>2 know that that's the case.</p> <p>3 A I don't -- yeah, that's true.</p> <p>4 All I know is I got a set of licenses</p> <p>5 that were like, I don't know whether it</p> <p>6 was 10 or 15 are 20. Something like</p> <p>7 that.</p> <p>8 Q They provided you with 10 or</p> <p>9 15 licenses.</p> <p>10 A That's true.</p> <p>11 Q Do you know how many licenses</p> <p>12 of their works they've entered into?</p> <p>13 A No.</p> <p>14 Q And do you know the range of</p> <p>15 values of the licenses for their works</p> <p>16 they've entered into?</p> <p>17 A Not entirely.</p> <p>18 Q Okay. And have you seen</p> <p>19 their answers to interrogatories where</p> <p>20 they identify all of the licenses --</p> <p>21 not they'll produce them, but they</p> <p>22 identify the license amounts --</p> <p>23 A Yes.</p> <p>24 Q -- and include about</p> <p>25 15 percent of them being gratis?</p>	<p style="text-align: right;">Page 485</p> <p>1 KOHN</p> <p>2 publishing company because they only</p> <p>3 know what they do. And they tell me,</p> <p>4 and then I verify it with somebody</p> <p>5 else. And somebody will say, that's</p> <p>6 sounds too high to me or sounds too</p> <p>7 low. They would have antitrust</p> <p>8 problems in talking to each other about</p> <p>9 what they charge for license fees, but</p> <p>10 they have no problem talking to me.</p> <p>11 Q You've done your -- you've</p> <p>12 done a lot of work in terms of your</p> <p>13 book. Did you do a study of the</p> <p>14 license fees being paid for production</p> <p>15 music outside of looking at the 10 to</p> <p>16 15 licenses given to you by Aron and</p> <p>17 Robert?</p> <p>18 A Yeah. There's a -- well,</p> <p>19 when you say study, I would say that my</p> <p>20 Chapter 26 does talk about licenses for</p> <p>21 production music libraries -- licenses</p> <p>22 of music from production music</p> <p>23 libraries. I don't recall actually the</p> <p>24 depth to which I was doing that</p> <p>25 because, remember, production music</p>

<p style="text-align: right;">Page 486</p> <p>1 KOHN</p> <p>2 libraries license both the sound</p> <p>3 recording and the musical work. And</p> <p>4 they're providing some real value there</p> <p>5 in reducing the transaction cost of the</p> <p>6 licensees. So it's a level of</p> <p>7 refinement that I might consider</p> <p>8 putting in the next edition of my book.</p> <p>9 Q Did you go to and examine the</p> <p>10 backup for your book in assessing the</p> <p>11 reasonableness of these values given to</p> <p>12 you by Aron and Robert?</p> <p>13 A I don't have any backup in</p> <p>14 any written form for any of the license</p> <p>15 fees that I have in my book.</p> <p>16 Q Did you -- given that, did</p> <p>17 you consult with any source to try to</p> <p>18 determine the reasonableness of the</p> <p>19 fees that they propose to you, you</p> <p>20 know, in assessing? Did you do any</p> <p>21 source at all?</p> <p>22 A I wouldn't have to do that</p> <p>23 because whatever sources I had over the</p> <p>24 past ten years or so to update the</p> <p>25 figures that I had in my book were my</p>	<p style="text-align: right;">Page 488</p> <p>1 KOHN</p> <p>2 I actually sorted them by</p> <p>3 dates. I went from 2010 to 2017 to</p> <p>4 make sure that I'm kind of matching</p> <p>5 their growth and their popularity of</p> <p>6 their songs. I actually listened to</p> <p>7 the songs to make sure that what I was</p> <p>8 hearing from Mulholland Drive, which I</p> <p>9 was able to do by going to the Extreme</p> <p>10 website and just click on it and use my</p> <p>11 TuneSat account or access. And</p> <p>12 listened to the songs to say, okay,</p> <p>13 what was in Lonely Orchard sounds</p> <p>14 production values that are just as</p> <p>15 good, equivalent to the ones that they</p> <p>16 have given on a work-for-hire basis to</p> <p>17 Viacom.</p> <p>18 So I felt that they were</p> <p>19 comparable and they -- I'm watching</p> <p>20 them get 60,000, 55,000 option 85,000,</p> <p>21 you know, 30,000, 40,000. I see all of</p> <p>22 that.</p> <p>23 Q But you didn't see any of the</p> <p>24 gratis licenses?</p> <p>25 A I didn't see any of the</p>
<p style="text-align: right;">Page 487</p> <p>1 KOHN</p> <p>2 sources for determining these license</p> <p>3 fees.</p> <p>4 Q And did you compare what you</p> <p>5 have in your book for production music</p> <p>6 license fees ranges to the numbers that</p> <p>7 Rob and Aron gave you? Did you consult</p> <p>8 your book at all in doing it?</p> <p>9 A I did consult my book, but I</p> <p>10 also took a look at my license fees</p> <p>11 that are in my book for production</p> <p>12 music. And I took a look at the</p> <p>13 license fees that they were issuing for</p> <p>14 production music. Or I would say if</p> <p>15 you want to call it production music,</p> <p>16 that's what they do in Lonely Orchard</p> <p>17 Music Publishing. They're producing</p> <p>18 production music with their sound</p> <p>19 recordings. And I found -- they gave</p> <p>20 me a license that said they got \$75,000</p> <p>21 sync fee for one. They got a 50,000</p> <p>22 sync fee for another one. They got</p> <p>23 20,000 -- 10,000, I think, was the</p> <p>24 lowest which is the one they -- they</p> <p>25 got from -- in 2010.</p>	<p style="text-align: right;">Page 489</p> <p>1 KOHN</p> <p>2 gratis licenses.</p> <p>3 Q You didn't see any of the</p> <p>4 lower value licenses. They selected</p> <p>5 what they wanted you to see?</p> <p>6 MR. MARDEROSIAN: Well, no,</p> <p>7 you're arguing with him.</p> <p>8 And you asked that question</p> <p>9 before, Don; and he's already told</p> <p>10 you he doesn't know if that's the</p> <p>11 case.</p> <p>12 You've had your opportunity</p> <p>13 to depose Aron and Robert, and</p> <p>14 you'll hear them again at trial</p> <p>15 explain all of this.</p> <p>16 So I'm going to object. It's</p> <p>17 argumentative and you're just</p> <p>18 asking this witness to speculate.</p> <p>19 A There are a variety of</p> <p>20 reasons why a gratis license might be</p> <p>21 given. I felt I was getting a good</p> <p>22 overview. It covered the entire</p> <p>23 time frame. It covered things that</p> <p>24 were very similar to the licenses that</p> <p>25 were listed in the exhibits in my</p>

<p style="text-align: right;">Page 490</p> <p>1 KOHN</p> <p>2 report. And what the fees that we came</p> <p>3 up with was reasonable -- were</p> <p>4 reasonable.</p> <p>5 Q By the way under the</p> <p>6 agreement, the 2011 agreement, is there</p> <p>7 any provision that gives Robert and</p> <p>8 Aron the right to second guess the</p> <p>9 license fees that Extreme was able to</p> <p>10 obtain?</p> <p>11 MR. MARDEROSIAN: I'm just</p> <p>12 going to object. It calls for a</p> <p>13 legal opinion and conclusion.</p> <p>14 It's called good faith and</p> <p>15 fair dealing as we all know which</p> <p>16 is a legal opinion and conclusion.</p> <p>17 MR. ZAKARIN: Could you swear</p> <p>18 in Mr. Marderosian? He wants to</p> <p>19 testify.</p> <p>20 MR. MARDEROSIAN: You're</p> <p>21 asking for a legal opinion, Don.</p> <p>22 MR. ZAKARIN: No, I asked him</p> <p>23 whether there's a provision in the</p> <p>24 agreement that gives him the right</p> <p>25 to second guess.</p>	<p style="text-align: right;">Page 492</p> <p>1 KOHN</p> <p>2 legal conclusion and I apologize for</p> <p>3 that but that's a summary -- where I</p> <p>4 felt this -- I see a \$14,000 license</p> <p>5 fee for the use of music in Land Rover.</p> <p>6 I see small license fees, Starbucks.</p> <p>7 They were way, way under.</p> <p>8 Q Way, way under what?</p> <p>9 A Way, way under what I thought</p> <p>10 was going to be -- based upon what they</p> <p>11 were getting for their quality of</p> <p>12 music. You can't just say this is</p> <p>13 just -- oh, just a piece of production</p> <p>14 music. Just some genre thing. These</p> <p>15 were some of the best songs that you</p> <p>16 guys had.</p> <p>17 Q You listened to the entire</p> <p>18 library? Did you listen to Hans Zimmer</p> <p>19 stuff?</p> <p>20 A No, I wasn't giving it a</p> <p>21 qualitative judgment. I did a</p> <p>22 quantitative judgment based upon</p> <p>23 reports that you provided during this</p> <p>24 litigation.</p> <p>25 Q Two libraries, not all the</p>
<p style="text-align: right;">Page 491</p> <p>1 KOHN</p> <p>2 That wasn't a legal opinion.</p> <p>3 MR. MARDEROSIAN: You both</p> <p>4 scraped at the agreement and</p> <p>5 there's an implied covenant of</p> <p>6 good faith and --</p> <p>7 MR. ZAKARIN: You're</p> <p>8 testifying again, Mr. Marderosian.</p> <p>9 MR. MARDEROSIAN: Well,</p> <p>10 you're asking me --</p> <p>11 A No, he's just repeating what</p> <p>12 I said earlier.</p> <p>13 Q I understand.</p> <p>14 I asked you whether there was</p> <p>15 a provision, not whether there's an</p> <p>16 implied covenant.</p> <p>17 A I would consider an implied</p> <p>18 covenant a provision of the agreement.</p> <p>19 I would consider -- I would consider</p> <p>20 given other things that I found in the</p> <p>21 evidence as to how these two</p> <p>22 songwriters were treated by their music</p> <p>23 publishing company. And I went through</p> <p>24 a long list of things that I felt were</p> <p>25 breaches of contract -- and that is a</p>	<p style="text-align: right;">Page 493</p> <p>1 KOHN</p> <p>2 libraries.</p> <p>3 A They're the two libraries</p> <p>4 that one says Mix Tape and one says</p> <p>5 Hype and they seems to be the two --</p> <p>6 where are the rest? Show us the rest,</p> <p>7 and we'll see.</p> <p>8 (Excerpt from the book</p> <p>9 entitled, Kohn On Music Licensing,</p> <p>10 was marked K Exhibit 6, for</p> <p>11 identification, as of this date.)</p> <p>12 Q I don't have to.</p> <p>13 I'm going to give you what</p> <p>14 we'll mark as Exhibit 6, another page</p> <p>15 from your book and your father's book.</p> <p>16 And this relates to value.</p> <p>17 I'm going to read under quantitative</p> <p>18 factors effecting value.</p> <p>19 Do you see that?</p> <p>20 A Yes.</p> <p>21 Q And it says, about halfway</p> <p>22 in, a music publisher with thousands of</p> <p>23 songs in its catalog and with years of</p> <p>24 experience in licensing music is likely</p> <p>25 to have access to much of the</p>

<p style="text-align: right;">Page 502</p> <p>1 KOHN</p> <p>2 MR. ZAKARIN: That's the</p> <p>3 answer.</p> <p>4 COURT REPORTER: Oh.</p> <p>5 MR. ZAKARIN: I don't have an</p> <p>6 answer.</p> <p>7 Q They could have been paid</p> <p>8 nothing.</p> <p>9 MR. MARDEROSIAN: And then he</p> <p>10 disagreed with you. He said it</p> <p>11 could be higher.</p> <p>12 MR. ZAKARIN: You can't</p> <p>13 testify.</p> <p>14 MR. MARDEROSIAN: I'm not</p> <p>15 testifying. It's just elementary</p> <p>16 and juvenile this type of</p> <p>17 examination.</p> <p>18 MR. ZAKARIN: Thank you.</p> <p>19 A They would not have granted a</p> <p>20 license for nothing. They would not</p> <p>21 have granted a license for 4,000, they</p> <p>22 would probably have granted it in the</p> <p>23 hundreds of thousands.</p> <p>24 Q Hundreds of thousands?</p> <p>25 A Yes.</p>	<p style="text-align: right;">Page 504</p> <p>1 KOHN</p> <p>2 Q And your point is?</p> <p>3 A And you already -- well, you</p> <p>4 already know it's one of your top</p> <p>5 songs. And Starbucks comes along; and</p> <p>6 you grant it for \$4,000.</p> <p>7 Q And half of the license fee</p> <p>8 at least goes to Extreme, right, which</p> <p>9 it shares with Viacom?</p> <p>10 A Yeah. Yes.</p> <p>11 Q And is it your view that</p> <p>12 Extreme wants to make as little money</p> <p>13 as it can?</p> <p>14 A I am not saying that they --</p> <p>15 what their goal should be. I'm saying</p> <p>16 given everything that's occurred in</p> <p>17 this, I am suspect about the license</p> <p>18 fees that were gained by -- garnered by</p> <p>19 Extreme for Rob and Aron's music.</p> <p>20 Q But you've never licensed</p> <p>21 production music on your own? You've</p> <p>22 never negotiated or issued --</p> <p>23 A I've negotiated sync</p> <p>24 licenses.</p> <p>25 Q -- for a production music</p>
<p style="text-align: right;">Page 503</p> <p>1 KOHN</p> <p>2 Q So your -- it's your</p> <p>3 testimony that if they had asked for</p> <p>4 hundreds of thousands, they would have</p> <p>5 gotten it and that's what your</p> <p>6 testimony is?</p> <p>7 A That's what -- you know, I</p> <p>8 think on that one I have \$200,000 for</p> <p>9 Starbucks, right?</p> <p>10 Q Yeah. You think that's what</p> <p>11 they would have gotten?</p> <p>12 A I think that that is well</p> <p>13 within reason for that song.</p> <p>14 Q And that's based upon your</p> <p>15 examining 10 to 15 licenses?</p> <p>16 A No, it's based upon -- yeah,</p> <p>17 the licenses as well as what I know</p> <p>18 commercial advertisements get from</p> <p>19 companies the size of Starbucks.</p> <p>20 Q Okay.</p> <p>21 A That license was granted</p> <p>22 only -- if you look at the date, it</p> <p>23 says 2/16/2017, that's about a -- only</p> <p>24 about a year before this litigation</p> <p>25 began. All right?</p>	<p style="text-align: right;">Page 505</p> <p>1 KOHN</p> <p>2 library?</p> <p>3 A What does it -- you know,</p> <p>4 I've negotiated sync licenses for</p> <p>5 theatricals on both sides. I've</p> <p>6 advised music publishing companies who</p> <p>7 were -- I -- people -- I write what I</p> <p>8 learn in my book and hundreds of others</p> <p>9 use my license fees for negotiating</p> <p>10 those synchronization licenses.</p> <p>11 I would venture to say that a</p> <p>12 large portion of the music publishing</p> <p>13 industry uses my Chapter 26 as a</p> <p>14 guideline.</p> <p>15 Q You would venture to guess</p> <p>16 that?</p> <p>17 A I'd venture to guess that</p> <p>18 many people -- I change it to I -- even</p> <p>19 the word venture is not even a good</p> <p>20 word.</p> <p>21 I would suggest that many</p> <p>22 people in the music publishing industry</p> <p>23 look to my book as for guidance as to</p> <p>24 what to charge for their music for the</p> <p>25 use in theatrical motion pictures,</p>

<p style="text-align: right;">Page 514</p> <p>1 KOHN</p> <p>2 A Yes.</p> <p>3 Q And you remember --</p> <p>4 A I don't remember the</p> <p>5 specifics of her testimony. But I</p> <p>6 remember the -- seeing the report as an</p> <p>7 exhibit and it being discussed.</p> <p>8 Q And you remember, as well,</p> <p>9 that, you know, cue sheet for cues</p> <p>10 works registrations are not even</p> <p>11 necessary?</p> <p>12 A That I'm aware of, yes.</p> <p>13 Q Because cue sheet</p> <p>14 registrations are actually sufficient,</p> <p>15 and that's what will drive payments?</p> <p>16 A I think that's correct for</p> <p>17 BMI. I'm not sure about ASCAP.</p> <p>18 Q Well, we're talking about</p> <p>19 BMI. We'll limit it to BMI.</p> <p>20 Turn to Page 38 of your</p> <p>21 report, please.</p> <p>22 A 39?</p> <p>23 Q Thirty-eight, the last</p> <p>24 paragraph says, and you're talking</p> <p>25 about Mulholland Drive with respect to</p>	<p style="text-align: right;">Page 516</p> <p>1 KOHN</p> <p>2 listed Bergeson, B-E-R-G-E-S-O-N, and</p> <p>3 Phoenix's names as the composers</p> <p>4 instead of Aron and Roberts. Do you</p> <p>5 see that?</p> <p>6 A Yes.</p> <p>7 Q Have you seen any documents</p> <p>8 that reflect that Extreme provided</p> <p>9 erroneous metadata to anybody in</p> <p>10 that -- in connection with this use?</p> <p>11 A If the Bergeson's and</p> <p>12 Phoenix's names were listed as</p> <p>13 composers, it's going to be as a result</p> <p>14 of metadata being supplied that caused</p> <p>15 that result.</p> <p>16 Q Did you read Dan Pounder's</p> <p>17 reply declaration? Is that one of the</p> <p>18 documents you read on the motion to</p> <p>19 dismiss?</p> <p>20 A Yes. Yes, I did.</p> <p>21 Q Did you look at the exhibits</p> <p>22 to his declaration?</p> <p>23 A I'm sure I did at the time.</p> <p>24 Q Did you notice the</p> <p>25 spreadsheet that was provided to manage</p>
<p style="text-align: right;">Page 515</p> <p>1 KOHN</p> <p>2 the Land Rover commercial is what</p> <p>3 you're talking about. That's the</p> <p>4 context.</p> <p>5 Do you see it?</p> <p>6 A The bottom of Page 38?</p> <p>7 Q Yes.</p> <p>8 A It appears from the evidence?</p> <p>9 Q Looking at -- take a look at</p> <p>10 the two paragraphs above which are</p> <p>11 dealing with the Land Rover commercial</p> <p>12 and Mulholland Drive.</p> <p>13 A On Mulholland Drive. Hold</p> <p>14 on. Let me look at this. Go ahead.</p> <p>15 Okay.</p> <p>16 Q The last paragraph, it says</p> <p>17 it appears from the evidence, however,</p> <p>18 that the problem stems from the</p> <p>19 metadata; i.e., the identifying</p> <p>20 information including title, composers,</p> <p>21 publishers and associated work IDs and</p> <p>22 related identifying information), close</p> <p>23 paren, that Extreme provided to its</p> <p>24 licensees in connection with Aron and</p> <p>25 Robert's Mulholland Drive song which</p>	<p style="text-align: right;">Page 517</p> <p>1 KOHN</p> <p>2 ad music which listed the metadata for</p> <p>3 the Land Rover commercial?</p> <p>4 A What was the date of the</p> <p>5 metadata?</p> <p>6 Q The date of the metadata --</p> <p>7 A What was the date of the</p> <p>8 metadata you're talking about?</p> <p>9 Q That was sent to manage ad</p> <p>10 music?</p> <p>11 MR. MARDEROSIAN: Can you</p> <p>12 produce the metadata?</p> <p>13 MR. ZAKARIN: It's attached</p> <p>14 to the --</p> <p>15 MR. MARDEROSIAN: The</p> <p>16 metadata isn't.</p> <p>17 MR. ZAKARIN: Yes, it is.</p> <p>18 MR. MARDEROSIAN: No, it's</p> <p>19 not.</p> <p>20 MR. ZAKARIN: Yes, it is.</p> <p>21 There's a spreadsheet.</p> <p>22 COURT REPORTER: Gentlemen,</p> <p>23 wait.</p> <p>24 MR. ZAKARIN: You're</p> <p>25 ridiculous.</p>

<p style="text-align: right;">Page 538</p> <p>1 KOHN</p> <p>2 the songs between November 2010 and</p> <p>3 November 2011 --</p> <p>4 A There were --</p> <p>5 Q -- for which the plaintiffs</p> <p>6 were not paid performance incomes? Are</p> <p>7 you aware as you sit here now?</p> <p>8 A I'm aware that they started</p> <p>9 using it well before registrations were</p> <p>10 filed.</p> <p>11 Q Before works registrations?</p> <p>12 A I have not been asked to</p> <p>13 research or opine on what effect that</p> <p>14 might have had on their royalty income.</p> <p>15 Q Okay.</p> <p>16 And you have no opinion as to</p> <p>17 whether it had any effect on their</p> <p>18 royalty income; is that right?</p> <p>19 A Well, I do know that if work</p> <p>20 registrations weren't filed and the cue</p> <p>21 sheets were inaccurate, they wouldn't</p> <p>22 have gotten paid.</p> <p>23 Q And if works --</p> <p>24 A And we found lots of cue</p> <p>25 sheets that were inaccurate. Not to</p>	<p style="text-align: right;">Page 540</p> <p>1 KOHN</p> <p>2 Q And you're aware that they</p> <p>3 were represented by counsel, as well,</p> <p>4 in connection with the 2011 contract?</p> <p>5 A I don't remember that.</p> <p>6 Q I think there's just one more</p> <p>7 topic that I want to cover. Turn to</p> <p>8 Page 62 of your report. And it's under</p> <p>9 Category F.</p> <p>10 Do you see that? Where</p> <p>11 you're describing what the defendants'</p> <p>12 contentions supposedly are. Do you see</p> <p>13 that? And Number 2 says, the</p> <p>14 defendants contend that under the 2011</p> <p>15 composer agreement Aron and Robert are</p> <p>16 only entitled to 50 percent of gross</p> <p>17 receipts generated by the four songs,</p> <p>18 paren, of the 124 songs delivered that</p> <p>19 Viacom Extreme placed into the</p> <p>20 production music library called the</p> <p>21 Hype music library.</p> <p>22 Do you see that?</p> <p>23 A Yes. I see that.</p> <p>24 Q And you say this again I</p> <p>25 think on Page 67, something to the</p>
<p style="text-align: right;">Page 539</p> <p>1 KOHN</p> <p>2 say that I know of every single cue</p> <p>3 sheet during that period of time. I</p> <p>4 don't know. But there's circumstantial</p> <p>5 evidence that they probably lost income</p> <p>6 as a result of the poor administration</p> <p>7 by Extreme, breach of contract.</p> <p>8 Q And if -- and if works</p> <p>9 registrations were filed and cue sheets</p> <p>10 were filed with inaccurate information</p> <p>11 they also wouldn't get paid, right?</p> <p>12 MR. MARDEROSIAN: Object to</p> <p>13 incomplete hypothetical.</p> <p>14 Assumes facts not in</p> <p>15 evidence.</p> <p>16 A Possibly.</p> <p>17 Q You're aware that Aron and</p> <p>18 Robert were represented by counsel in</p> <p>19 connection with the 2010 contract,</p> <p>20 aren't you?</p> <p>21 A I'm not aware of that.</p> <p>22 Q You didn't read Robert's</p> <p>23 deposition?</p> <p>24 A I read it, but I don't</p> <p>25 remember it.</p>	<p style="text-align: right;">Page 541</p> <p>1 KOHN</p> <p>2 effect where you say Extreme's COO Dan</p> <p>3 Pounder contends that the only songs</p> <p>4 which will generate income to which</p> <p>5 Aron and Robert will be entitled to a</p> <p>6 50 percent share is when their songs</p> <p>7 are placed in the production music</p> <p>8 catalog entitled Hype Music Library,</p> <p>9 that if their songs are placed in a</p> <p>10 catalog entitled Mixed Tape Music</p> <p>11 Library, they will not earn a</p> <p>12 percentage of gross receipts.</p> <p>13 Do you see that?</p> <p>14 A Yes.</p> <p>15 Q Is it your recollection,</p> <p>16 Mr. Kohn, that Mr. Pounder said that</p> <p>17 the only songs on which Extreme was</p> <p>18 paying sync licensing income was the</p> <p>19 four songs in the Hype music library?</p> <p>20 MR. MARDEROSIAN: I'm going</p> <p>21 to object. It's vague.</p> <p>22 Mischaracterizes the testimony.</p> <p>23 Q Is that your testimony?</p> <p>24 A He was clear about saying</p> <p>25 that he only had -- that Extreme only</p>

<p style="text-align: right;">Page 554</p> <p>1 KOHN</p> <p>2 in September and October working on</p> <p>3 this engagement?</p> <p>4 A I haven't even looked --</p> <p>5 counted yet. I haven't put together a</p> <p>6 bill for it.</p> <p>7 Q You can't give me an estimate</p> <p>8 right now?</p> <p>9 A No, I really can't.</p> <p>10 Q Are all your opinions that</p> <p>11 you intend to testify to at the trial</p> <p>12 of this action or in summary judgment</p> <p>13 identified in this report?</p> <p>14 MR. MARDEROSIAN: Object.</p> <p>15 It's vague and overbroad.</p> <p>16 A Well, at the end, say at</p> <p>17 trial I reserve the right to use all</p> <p>18 materials considered in preparing this</p> <p>19 report including without limitation</p> <p>20 materials set forth in foregoing</p> <p>21 sections. I understand that additional</p> <p>22 depositions of experts and other</p> <p>23 witnesses may be conducted in this</p> <p>24 matter. I plan on reviewing their</p> <p>25 deposition transcripts when they become</p>	<p style="text-align: right;">Page 556</p> <p>1 KOHN</p> <p>2 further opinions based upon additional</p> <p>3 information, additional reports that I</p> <p>4 would supplement the report with.</p> <p>5 Q Have you come across any such</p> <p>6 additional information?</p> <p>7 A Lots of additional</p> <p>8 information.</p> <p>9 Q Other than the depositions</p> <p>10 and reports of defendants' experts,</p> <p>11 what other information have you come</p> <p>12 across, just describe generally?</p> <p>13 A Exhibits to those reports.</p> <p>14 Whatever other physical materials that</p> <p>15 might have been given to me since I</p> <p>16 wrote my report.</p> <p>17 Q Other materials given to you</p> <p>18 by whom?</p> <p>19 A That might have been given to</p> <p>20 me by somebody.</p> <p>21 Q Well, did anybody give you</p> <p>22 any other materials?</p> <p>23 A I don't remember. I mean,</p> <p>24 I'm just being -- I'm trying to be</p> <p>25 general because I might have received</p>
<p style="text-align: right;">Page 555</p> <p>1 KOHN</p> <p>2 available and reserve the right to</p> <p>3 supplement or amend this report after</p> <p>4 such review. Finally, I reserve the</p> <p>5 right to supplement or modify this</p> <p>6 report and the opinions expressed based</p> <p>7 upon additional facts --</p> <p>8 COURT REPORTER: Sir, please.</p> <p>9 MR. MARDEROSIAN: You just</p> <p>10 have to really make an effort</p> <p>11 to --</p> <p>12 A Finally, I reserve the right</p> <p>13 to supplement or modify this report and</p> <p>14 the opinions expressed based upon</p> <p>15 additional facts, documents or other</p> <p>16 materials that may be brought to my</p> <p>17 attention.</p> <p>18 Q So is the answer no? The</p> <p>19 answer is no, that all -- the opinions</p> <p>20 that you intend to testify to at</p> <p>21 summary judgment or trial are not all</p> <p>22 contained within this report?</p> <p>23 A The report contains opinions</p> <p>24 that I've come up to up until the time</p> <p>25 I issued the report. I might have</p>	<p style="text-align: right;">Page 557</p> <p>1 KOHN</p> <p>2 something during an attachment to</p> <p>3 something that I -- I'm just trying to</p> <p>4 be all inclusive. I mean, I don't have</p> <p>5 anything --</p> <p>6 Q Let me make this easy for</p> <p>7 you. Did Mr. Marderosian or Ms. Cohen,</p> <p>8 did plaintiffs' counsel give you any</p> <p>9 additional materials following the</p> <p>10 service of this report?</p> <p>11 A No.</p> <p>12 Q Did --</p> <p>13 A Not that I recall.</p> <p>14 Q Did plaintiffs give you any</p> <p>15 additional material that you intend to</p> <p>16 reply upon directly, other than this</p> <p>17 one identified in this report?</p> <p>18 A I don't think so, no. No.</p> <p>19 Q Other than what's identified</p> <p>20 in this report?</p> <p>21 A No. No.</p> <p>22 Q So as far as documents</p> <p>23 provided to you by plaintiffs or</p> <p>24 plaintiffs' law firm, there are no</p> <p>25 additional materials on which you</p>

<p style="text-align: right;">Page 558</p> <p>1 KOHN</p> <p>2 intend to base your opinions other than</p> <p>3 what's identified in this report; is</p> <p>4 that accurate?</p> <p>5 A And additional documents that</p> <p>6 might be attached to the expert witness</p> <p>7 reports, their deposition testimony</p> <p>8 that I heard, documents that I might</p> <p>9 have seen in the process of their</p> <p>10 taking of depositions. And then the</p> <p>11 transcripts that may come in and</p> <p>12 documents attached to those transcripts</p> <p>13 that I might not have seen during their</p> <p>14 deposition because I hadn't looked at</p> <p>15 them directly.</p> <p>16 Q Okay.</p> <p>17 There's nothing else?</p> <p>18 A There's nothing else.</p> <p>19 MR. MARDEROSIAN: He received</p> <p>20 all discovery documents and then</p> <p>21 your expert reports.</p> <p>22 MR. HWANG: Understood.</p> <p>23 A And that occurred after my</p> <p>24 report, the expert reports.</p> <p>25 Q Okay.</p>	<p style="text-align: right;">Page 560</p> <p>1 KOHN</p> <p>2 I'll refer to them collectively as the</p> <p>3 Viacom defendants.</p> <p>4 A Okay.</p> <p>5 Q But when I say Viacom, I mean</p> <p>6 Viacom International, Inc. Okay? Is</p> <p>7 that clear?</p> <p>8 A So when you say Viacom, you</p> <p>9 mean Viacom International, Inc.?</p> <p>10 Q Correct.</p> <p>11 A And when you say Viacom</p> <p>12 defendants you mean anyone or all or</p> <p>13 some?</p> <p>14 Q Both Viacom International,</p> <p>15 Inc., and New Creative Mix, Inc.</p> <p>16 A Okay. And not MTV Networks</p> <p>17 or any other subsidiaries.</p> <p>18 Q Well, I'll disclose to you</p> <p>19 that MTV Networks is a division of</p> <p>20 Viacom International, Inc. It's not a</p> <p>21 subsidiary.</p> <p>22 A It's a division but not a</p> <p>23 subsidiary. It's not a separate</p> <p>24 corporation?</p> <p>25 Q Correct.</p>
<p style="text-align: right;">Page 559</p> <p>1 KOHN</p> <p>2 Switching gears. You</p> <p>3 understand -- let me just preface this,</p> <p>4 I'm going to -- tread over some ground</p> <p>5 that we've already covered today. I'm</p> <p>6 going to try to be as non-duplicative</p> <p>7 as possible.</p> <p>8 A Thank you.</p> <p>9 Q But some of this will sound</p> <p>10 familiar.</p> <p>11 So switching gears, you</p> <p>12 understand that Viacom is an owner of</p> <p>13 the songs that are at issue in this</p> <p>14 case?</p> <p>15 MR. MARDEROSIAN: Objection.</p> <p>16 Vague. Calls for a legal</p> <p>17 opinion and conclusion.</p> <p>18 A Viacom meaning, I guess, New</p> <p>19 Creative Mix. Aren't they co-owned?</p> <p>20 Q Let me withdraw the question.</p> <p>21 Let me just clarify the question.</p> <p>22 When I refer to Viacom, I'm</p> <p>23 referring to Viacom International, Inc.</p> <p>24 If I'm referring to New Creative, I'll</p> <p>25 call them New Creative. If I refer --</p>	<p style="text-align: right;">Page 561</p> <p>1 KOHN</p> <p>2 So when I say Viacom, I'm</p> <p>3 referring to Viacom International,</p> <p>4 Inc., which includes MTV.</p> <p>5 A Okay.</p> <p>6 I'm little confused about</p> <p>7 some of this, but I think we're on the</p> <p>8 same page in terms of Viacom. We'll</p> <p>9 try to be careful about -- and you'll</p> <p>10 correct me if I use the word -- wrong</p> <p>11 Viacom in my answer.</p> <p>12 Q I don't think I'll know, but</p> <p>13 let's just set the ground rules now so</p> <p>14 we're both clear. When I refer to</p> <p>15 Viacom, I'm referring to Viacom</p> <p>16 International, Inc. Does that make</p> <p>17 sense?</p> <p>18 A Yes.</p> <p>19 Q Is it your understanding that</p> <p>20 Viacom is an owner of the songs at</p> <p>21 issue in this case?</p> <p>22 MR. MARDEROSIAN: Objection.</p> <p>23 Calls for a legal opinion and</p> <p>24 conclusion.</p> <p>25 A I don't think they own the</p>

<p style="text-align: right;">Page 618</p> <p>1 KOHN</p> <p>2 are governed by the terms of the 2011</p> <p>3 composer agreement. That's your</p> <p>4 understanding?</p> <p>5 A Yes.</p> <p>6 MR. MARDEROSIAN: Calls for a</p> <p>7 legal opinion and conclusion.</p> <p>8 Q Just let me finish my</p> <p>9 question before you answer, for her</p> <p>10 sake.</p> <p>11 A Yeah, I wasn't sure. I</p> <p>12 thought you were.</p> <p>13 I'm sorry.</p> <p>14 Q Is there any other source of</p> <p>15 rights the Marderosians or any of the</p> <p>16 plaintiffs have to the songs at issue</p> <p>17 in this action?</p> <p>18 MR. MARDEROSIAN: Vague.</p> <p>19 Calls for a legal opinion.</p> <p>20 A When I said they have</p> <p>21 contractual rights, I included in</p> <p>22 expressed rights or implied rights</p> <p>23 under those contracts.</p> <p>24 Q By implied rights, you're</p> <p>25 referring to the implied covenant and</p>	<p style="text-align: right;">Page 620</p> <p>1 KOHN</p> <p>2 Q One more time. Let's not</p> <p>3 speak over each other. It's making it</p> <p>4 tough on her.</p> <p>5 A You did finish it.</p> <p>6 Q You're always one word too</p> <p>7 early. So just give it a pause, let me</p> <p>8 finish the question.</p> <p>9 A But he had objected to it</p> <p>10 already.</p> <p>11 ^discussion off the record</p> <p>12 Q So let's turn to K3, which is</p> <p>13 the 2011 composer agreement.</p> <p>14 A I have it in my hand.</p> <p>15 Q Where in this agreement does</p> <p>16 it say that Viacom is obligated to pay</p> <p>17 a license fee for the use of the songs</p> <p>18 at issue in this action?</p> <p>19 MR. MARDEROSIAN: Calls for a</p> <p>20 legal opinion.</p> <p>21 A I would take Section 1.4, the</p> <p>22 gross receipts definition combined with</p> <p>23 Section 7, compensation, which to</p> <p>24 summarize requires that the 1260 and</p> <p>25 the Marderosians are entitled to</p>
<p style="text-align: right;">Page 619</p> <p>1 KOHN</p> <p>2 good faith and fair dealing?</p> <p>3 A Among others, to the extent</p> <p>4 there are others.</p> <p>5 Q What others?</p> <p>6 A I don't know.</p> <p>7 Q So the only one you're aware</p> <p>8 of as far as implied rights go are --</p> <p>9 is the implied covenant and good faith</p> <p>10 and fair dealing, right?</p> <p>11 MR. MARDEROSIAN: Calls for a</p> <p>12 legal opinion.</p> <p>13 A Yeah, I'd like to do some --</p> <p>14 I would want to do some legal research</p> <p>15 before answering that definitively as a</p> <p>16 legal conclusion, but that's the only</p> <p>17 one I can think of today.</p> <p>18 Q That's the only implied right</p> <p>19 referenced in your expert report,</p> <p>20 right?</p> <p>21 A Yes.</p> <p>22 MR. MARDEROSIAN: Calls for a</p> <p>23 legal opinion.</p> <p>24 A Yes, that's the only one</p> <p>25 that's referenced in my --</p>	<p style="text-align: right;">Page 621</p> <p>1 KOHN</p> <p>2 50 percent of gross receipts derived</p> <p>3 from the exploitation of the songs that</p> <p>4 they delivered under this agreement.</p> <p>5 Q Anything else?</p> <p>6 A There is an implied</p> <p>7 obligation of good faith that New</p> <p>8 Creative, which owned the copyrights,</p> <p>9 and whoever else derived rights from</p> <p>10 them, if they were transferred to</p> <p>11 somebody else, to charge arm's length</p> <p>12 license fees to those affiliated</p> <p>13 entities that it might have a</p> <p>14 relationship with. That would cause a</p> <p>15 conflict of interest and to otherwise</p> <p>16 charge arm's length license fees would</p> <p>17 be, and this is a legal conclusion, be</p> <p>18 in violation of the implied covenant of</p> <p>19 good faith, which is the affiliated</p> <p>20 company problem that I talked about</p> <p>21 earlier that I talked about in my</p> <p>22 report and that I talked about in my</p> <p>23 book as early as 1992, the first</p> <p>24 edition of Kohn on Music Licensing.</p> <p>25 Q The first edition, was that</p>


<p style="text-align: right;">Page 622</p> <p>1 KOHN</p> <p>2 written by your father?</p> <p>3 A No, that was written by me.</p> <p>4 MR. MARDEROSIAN: Come on.</p> <p>5 He's told you that.</p> <p>6 Why are you being personal</p> <p>7 like that?</p> <p>8 MR. HWANG: I honestly didn't</p> <p>9 know. I thought he took over a</p> <p>10 subsequent edition.</p> <p>11 A I wrote the book over ten</p> <p>12 years. There is -- just to clarify, my</p> <p>13 father did write a little short history</p> <p>14 of Warner Brother's Music or Warner</p> <p>15 Chappell Music, which I did include in</p> <p>16 the book. I added it, but it's about a</p> <p>17 page or two long. And every other word</p> <p>18 in the book I wrote either through my</p> <p>19 own knowledge and research or through</p> <p>20 asking my father principle policies and</p> <p>21 licensing philosophies that he</p> <p>22 developed over his many years as a</p> <p>23 music publisher.</p> <p>24 Q I thought he had written a</p> <p>25 book, no?</p>	<p style="text-align: right;">Page 624</p> <p>1 KOHN</p> <p>2 A Directly.</p> <p>3 Q MTV is, again, a division of</p> <p>4 Viacom International, Inc.</p> <p>5 A Okay. Okay.</p> <p>6 So New Creative Mix is -- it</p> <p>7 says incorporated. So I assume it's a</p> <p>8 corporation, right?</p> <p>9 Q It's a subsidiary, correct.</p> <p>10 A Okay.</p> <p>11 So it's a corporation that is</p> <p>12 wholly owned by Viacom International,</p> <p>13 Inc.?</p> <p>14 Q Could I just -- I don't want</p> <p>15 to interrupt you, but I really just</p> <p>16 want to speed this up.</p> <p>17 Who are the affiliated</p> <p>18 companies within Viacom?</p> <p>19 A Well, I wanted to answer your</p> <p>20 question because New Creative, Inc., is</p> <p>21 the company that these guys did the</p> <p>22 deal with. If they did a -- so if they</p> <p>23 did a deal with Warner Brothers -- if</p> <p>24 they did a deal with Universal Music,</p> <p>25 and Universal Music has a -- is owned</p>
<p style="text-align: right;">Page 623</p> <p>1 KOHN</p> <p>2 A No. He's written some songs.</p> <p>3 He was an arranger. He never wrote a</p> <p>4 book.</p> <p>5 Q Your father never wrote a</p> <p>6 book about licensing, music licensing?</p> <p>7 A No.</p> <p>8 Q Okay.</p> <p>9 The affiliated company</p> <p>10 problem you referred to, how does that</p> <p>11 manifest itself within the context of</p> <p>12 this case as far as Viacom is</p> <p>13 concerned, to the best of your</p> <p>14 understanding?</p> <p>15 A Okay.</p> <p>16 So the plaintiffs signed an</p> <p>17 agreement with New Creative Mix, Inc.,</p> <p>18 which I understand is either a</p> <p>19 subsidiary or -- I don't know what you</p> <p>20 call it, owned by either MTV Networks</p> <p>21 or the entity that's now called MTV</p> <p>22 Networks. They changed the name.</p> <p>23 Q New Creative Mix, just to</p> <p>24 speed this up, is owned by Viacom</p> <p>25 International, Inc.?</p>	<p style="text-align: right;">Page 625</p> <p>1 KOHN</p> <p>2 by the same company that owns Universal</p> <p>3 Pictures, it doesn't mean that</p> <p>4 Universal Music, because it owns Works</p> <p>5 For Hire works that it can license</p> <p>6 their works to Universal Pictures for</p> <p>7 free.</p> <p>8 And so what I'm trying to do</p> <p>9 by analogy is New Creative Mix cannot</p> <p>10 license any of the Viacom affiliated</p> <p>11 entities; that is, their parent, their</p> <p>12 subsidiaries, their sister companies,</p> <p>13 meaning other companies who are owned</p> <p>14 by Viacom, Inc., the parent of Viacom</p> <p>15 Inc. They're all affiliated companies.</p> <p>16 They all have a direct financial</p> <p>17 relationship.</p> <p>18 So it will be a conflict of</p> <p>19 interest for New Creative Mix to grant</p> <p>20 to any of those affiliated companies a</p> <p>21 license that's not an arm's length</p> <p>22 transaction to the best of it's ability</p> <p>23 in good faith and nor could they</p> <p>24 transfer their rights to anyone who</p> <p>25 would do the same thing. Because their</p>

157 (Pages 622 - 625)

<p style="text-align: right;">Page 698</p> <p>1 KOHN</p> <p>2 13, correct?</p> <p>3 A I'll accept your</p> <p>4 representation that it does.</p> <p>5 Q Okay.</p> <p>6 So, in fact, your statement</p> <p>7 that Viacom has not produced a</p> <p>8 commensurate number of cue sheets for</p> <p>9 the episodes aired with respect to</p> <p>10 Jersey Shore, that's a false statement,</p> <p>11 right?</p> <p>12 A I didn't find these when I</p> <p>13 was flipping through and looking for</p> <p>14 that in the BMI statements that I have.</p> <p>15 I don't have paper copies, they're all</p> <p>16 PDFs. So I didn't see them.</p> <p>17 Q But it's an incorrect</p> <p>18 statement, correct?</p> <p>19 MR. MARDEROSIAN: I am just</p> <p>20 going to object that it assumes</p> <p>21 facts not in evidence that these</p> <p>22 cue sheets were submitted to BMI.</p> <p>23 A Well, again, I -- they appear</p> <p>24 to be cue sheets for those episodes.</p> <p>25 The only one I looked at in detail was</p>	<p style="text-align: right;">Page 700</p> <p>1 KOHN</p> <p>2 Exhibit 10 is a printout from</p> <p>3 IMDB.com of all 20 episodes from the</p> <p>4 two seasons of the show Ain't That</p> <p>5 America. And there are eight episodes</p> <p>6 in Season 1 and there are 12 episodes</p> <p>7 in Season 2. Eleven is the 20 cue</p> <p>8 sheets corresponding to each of those</p> <p>9 episodes.</p> <p>10 And you can take a look</p> <p>11 through and confirm that for me.</p> <p>12 A I accept your representation</p> <p>13 that these are what you just described.</p> <p>14 Q Okay.</p> <p>15 A Without going through every</p> <p>16 one of them.</p> <p>17 Q So your statement that Viacom</p> <p>18 has not produced a commensurate number</p> <p>19 of cue sheets for the episodes aired</p> <p>20 with respect to the show Ain't That</p> <p>21 America is also incorrect, right?</p> <p>22 A Apparently these are two</p> <p>23 examples. I was given two examples and</p> <p>24 apparently -- if your representation is</p> <p>25 correct that these represent every</p>
<p style="text-align: right;">Page 699</p> <p>1 KOHN</p> <p>2 the first one.</p> <p>3 Q Okay.</p> <p>4 A And there was a song that's</p> <p>5 in there, you know, that is the Rob and</p> <p>6 Aron song -- an Aron and Rob song back</p> <p>7 there and The Young Heathens. It's</p> <p>8 there. I missed it.</p> <p>9 MR. HWANG: Mark this as</p> <p>10 Exhibit 10.</p> <p>11 (Printout from IMDB.com of</p> <p>12 all 20 episodes from the two</p> <p>13 seasons of the show Ain't That</p> <p>14 America, was marked K Exhibit 10,</p> <p>15 for identification, as of this</p> <p>16 date.)</p> <p>17 (Cue sheets corresponding to</p> <p>18 K Exhibit 10, was marked K Exhibit</p> <p>19 11, for identification, as of this</p> <p>20 date.)</p> <p>21 MR. HWANG: Exhibits K10 and</p> <p>22 K11.</p> <p>23 Q Mr. Kohn, the reporter has</p> <p>24 handed you two separate exhibits,</p> <p>25 Exhibits 10 and 11.</p>	<p style="text-align: right;">Page 701</p> <p>1 KOHN</p> <p>2 single episode then that would be an</p> <p>3 incorrect statement.</p> <p>4 Q Okay.</p> <p>5 Who gave these facts to you?</p> <p>6 A I asked for two examples of</p> <p>7 missing cue sheets that would be</p> <p>8 familiar to people who are -- you know,</p> <p>9 there's a lot of songs -- a lot of TV</p> <p>10 shows you can pick. I'm familiar with</p> <p>11 Jersey Shore. I'm familiar with Ain't</p> <p>12 That America. I recognize those. And</p> <p>13 they said these are two and they</p> <p>14 suggested that those are the two</p> <p>15 examples where cue sheets were missing.</p> <p>16 Q They being -- they being the</p> <p>17 plaintiffs?</p> <p>18 A Well, Mick, yes.</p> <p>19 Q And these are the only two</p> <p>20 examples within this category under</p> <p>21 Subsection B of Viacom's purported</p> <p>22 failure to submit cue sheets to BMI,</p> <p>23 correct?</p> <p>24 A I'm sorry, the only what?</p> <p>25 Q The two examples that you</p>

<p style="text-align: right;">Page 702</p> <p>1 KOHN</p> <p>2 identity of instances where Viacom</p> <p>3 failed to submit a sufficient number of</p> <p>4 cue sheets to BMI or Jersey Shore and</p> <p>5 Ain't That America, right, in your</p> <p>6 entire report?</p> <p>7 A I think those are the two</p> <p>8 examples that I provided and they may</p> <p>9 be the only ones; but, yes.</p> <p>10 Q And they're both incorrect,</p> <p>11 right?</p> <p>12 A Looks like it.</p> <p>13 Q Do you know if the</p> <p>14 Marderosians received their writer</p> <p>15 share of public performance royalties</p> <p>16 with respect to each of the 15 episodes</p> <p>17 of Jersey Shore identified in your</p> <p>18 Footnote 13?</p> <p>19 A Well, I have all of the</p> <p>20 statements and if I went back and</p> <p>21 looked I would be able to tell you.</p> <p>22 Q Did you look?</p> <p>23 A I was focused more on the</p> <p>24 detections on TuneSat, so I don't</p> <p>25 remember looking at the BMI statements.</p>	<p style="text-align: right;">Page 704</p> <p>1 KOHN</p> <p>2 that.</p> <p>3 Q With respect to Ain't That</p> <p>4 America, is it the same, you didn't go</p> <p>5 through the BMI statements for Robert</p> <p>6 and Aron Marderosian to confirm whether</p> <p>7 or not they received any public</p> <p>8 performance income with respect to the</p> <p>9 20 episodes of that show?</p> <p>10 A I didn't because I was</p> <p>11 operating under the assumption. I</p> <p>12 didn't see the cue sheets. I saw the</p> <p>13 detections. I didn't go look at BMI</p> <p>14 and I should have.</p> <p>15 Q And if, in fact, the</p> <p>16 Marderosians received their writer</p> <p>17 share of public performance royalties</p> <p>18 with respect to each of these 20</p> <p>19 episodes of Ain't That America and the</p> <p>20 15 episodes you identified for Jersey</p> <p>21 Shore, that would necessarily mean that</p> <p>22 Viacom had submitted cue sheets for</p> <p>23 each of those episodes to BMI, right?</p> <p>24 A If, in fact, they got</p> <p>25 performance royalties in their</p>
<p style="text-align: right;">Page 703</p> <p>1 KOHN</p> <p>2 Or did I? I don't remember right now.</p> <p>3 I think I focused on the TuneSat</p> <p>4 detections, that there were lots --</p> <p>5 they were missing cue sheets and there</p> <p>6 were lots of performances. But I may</p> <p>7 have missed going to the BMI statements</p> <p>8 to check. They're very detailed and,</p> <p>9 as you know, looking for these are like</p> <p>10 a needle in a haystack. With</p> <p>11 everything else that I was doing I</p> <p>12 wasn't going to go into that level of</p> <p>13 detail on this.</p> <p>14 Q So you didn't look at the BMI</p> <p>15 statements to confirm that -- whether</p> <p>16 or not --</p> <p>17 A No.</p> <p>18 Q Hold on.</p> <p>19 Whether or not the</p> <p>20 Marderosians received the writer share</p> <p>21 of public performance royalties with</p> <p>22 respect to each of the 15 episodes</p> <p>23 identified for Jersey Shore in your</p> <p>24 Footnote 13, correct?</p> <p>25 A Yes. I don't remember doing</p>	<p style="text-align: right;">Page 705</p> <p>1 KOHN</p> <p>2 statements on these shows -- I don't</p> <p>3 know whether they have or not because I</p> <p>4 haven't looked at the statements. They</p> <p>5 might not have. I don't really know.</p> <p>6 You represent to me that</p> <p>7 you've looked at the statements and you</p> <p>8 found monies paid to them for --</p> <p>9 throughout this entire period.</p> <p>10 Q I haven't represented that to</p> <p>11 you, no.</p> <p>12 MR. MARDEROSIAN: He said --</p> <p>13 I don't remember him saying that.</p> <p>14 A I'm asking him if he has,</p> <p>15 so -- but I haven't seen it, so I can't</p> <p>16 tell you that they have been paid</p> <p>17 because I don't remember looking at the</p> <p>18 BMI statements for that purpose. I</p> <p>19 looked at them for other purposes but I</p> <p>20 don't recall doing that.</p> <p>21 I kind of may have jumped to</p> <p>22 the conclusion that since I couldn't</p> <p>23 find what you just showed me out of</p> <p>24 thousands of BMI statements that were</p> <p>25 clogging up my hard disk, that there</p>

<p style="text-align: right;">Page 746</p> <p>1 KOHN</p> <p>2 upon who's manipulating the data and</p> <p>3 for what purpose.</p> <p>4 Q Let me ask you this question:</p> <p>5 Viewed in isolation, would these four</p> <p>6 cue sheets to you be an indication of</p> <p>7 bad faith on the part of Viacom in its</p> <p>8 submission of cue sheets to BMI?</p> <p>9 MR. MARDEROSIAN: That's the</p> <p>10 same question. Asked and</p> <p>11 answered.</p> <p>12 I'm going to object. It</p> <p>13 calls for a legal opinion and</p> <p>14 conclusion.</p> <p>15 A I've answered that question.</p> <p>16 Q No, you answered a very</p> <p>17 different question that you asked</p> <p>18 yourself.</p> <p>19 I'm asking you this narrow</p> <p>20 question. Viewed in isolation, would</p> <p>21 the submission of these four cue</p> <p>22 sheets, out of the hundreds that Viacom</p> <p>23 submitted to BMI, be an indicator to</p> <p>24 you in your expert opinion of Viacom's</p> <p>25 bad faith in its submission of cue</p>	<p style="text-align: right;">Page 748</p> <p>1 KOHN</p> <p>2 A That's a hypothetical that</p> <p>3 you can ask. I'm not going to be</p> <p>4 taking -- using Viacom -- using what</p> <p>5 you were trying to do in the context of</p> <p>6 everything else that's going on here.</p> <p>7 Q I'm going to ask you -- I'm</p> <p>8 going to ask you one more time. Okay?</p> <p>9 These four cue sheets viewed</p> <p>10 in isolation out of the hundreds of cue</p> <p>11 sheets that Viacom submitted to BMI</p> <p>12 listing one or more of the songs at</p> <p>13 issue in this case, would you take</p> <p>14 that -- do you take that as an</p> <p>15 indicator of Viacom's bad faith in its</p> <p>16 cue sheet submission practices?</p> <p>17 MR. MARDEROSIAN: I'm going</p> <p>18 to object. It calls for a legal</p> <p>19 opinion and conclusion.</p> <p>20 Q This is the last time I'm</p> <p>21 going to ask this question and if you</p> <p>22 refuse to answer it will be noted.</p> <p>23 A I've already answered the</p> <p>24 question.</p> <p>25 Q No, you gave me a totally</p>
<p style="text-align: right;">Page 747</p> <p>1 KOHN</p> <p>2 sheets to BMI?</p> <p>3 MR. MARDEROSIAN: Object.</p> <p>4 It calls for a legal opinion</p> <p>5 and conclusion.</p> <p>6 A Again, if you wanted to set</p> <p>7 up a hypothetical where a composer's</p> <p>8 name is incorrect on a cue sheet out of</p> <p>9 thousands of cue sheets, and that's the</p> <p>10 only thing -- let's say it's Warner</p> <p>11 Brothers Pictures, out of thousands of</p> <p>12 cue sheets they submitted to BMI -- or</p> <p>13 Warners Brother's Television, out of</p> <p>14 thousands of cue sheets they submitted</p> <p>15 to BMI and they had one error that they</p> <p>16 forgot to put a composer's name in or</p> <p>17 they either themselves had changed the</p> <p>18 name of the composer to something like</p> <p>19 Mix Tape or used somebody else's</p> <p>20 metadata, in total isolation, in that</p> <p>21 hypothetical, you could say it sounded</p> <p>22 like something that would not</p> <p>23 necessarily bring about a accusation of</p> <p>24 bad faith.</p> <p>25 Q Okay.</p>	<p style="text-align: right;">Page 749</p> <p>1 KOHN</p> <p>2 different hypothetical.</p> <p>3 MR. MARDEROSIAN: I'd like to</p> <p>4 finish my objection.</p> <p>5 Q Are you refusing to answer my</p> <p>6 question?</p> <p>7 A That was -- that was the</p> <p>8 second or third time I answered your</p> <p>9 question.</p> <p>10 MR. MARDEROSIAN: I'd like to</p> <p>11 finish my objection.</p> <p>12 It's an incomplete</p> <p>13 hypothetical. And it's been asked</p> <p>14 and answered and it's getting to</p> <p>15 the point where it's harassment.</p> <p>16 Q Are you refusing to answer my</p> <p>17 question?</p> <p>18 A I already answered your</p> <p>19 question.</p> <p>20 Q So the answer is yes,</p> <p>21 you're --</p> <p>22 A You don't like the answer</p> <p>23 that's the only thing here.</p> <p>24 Q So the answer is yes, you're</p> <p>25 refusing to answer my question?</p>

<p style="text-align: right;">Page 750</p> <p>1</p> <p>2 A I answered your question.</p> <p>3 Q Okay.</p> <p>4 (Time noted: 1:47 a.m.)</p> <p>5</p> <p>6</p> <p>7</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 752</p> <p>1</p> <p>2 CERTIFICATION</p> <p>3</p> <p>4 STATE OF NEW YORK)</p> <p>5) ss.:</p> <p>6 COUNTY OF NEW YORK)</p> <p>7</p> <p>8 I, JUDITH CASTORE, Shorthand Reporter</p> <p>9 and Notary Public within and for the State</p> <p>10 of New York, do hereby certify:</p> <p>11 That ROBERT H. KOHN, the witness</p> <p>12 whose deposition is hereinbefore set</p> <p>13 forth, was duly sworn by me and that this</p> <p>14 transcript of such examination is a true</p> <p>15 record of the testimony given by such</p> <p>16 witness.</p> <p>17 I further certify that I am not</p> <p>18 related to any of the parties to this</p> <p>19 action by blood or marriage and that I am</p> <p>20 in no way interested in the outcome of</p> <p>21 this matter.</p> <p>22 IN WITNESS WHEREOF, I have hereunto</p> <p>23 set my hand this 8th day of November,</p> <p>24 2018.</p> <p>25  JUDITH CASTORE</p>
<p style="text-align: right;">Page 751</p> <p>1</p> <p>2 STATE OF _____)</p> <p>3) :ss</p> <p>4 COUNTY OF _____)</p> <p>5</p> <p>6</p> <p>7 I, ROBERT H. KOHN, the witness</p> <p>8 herein, having read the foregoing</p> <p>9 testimony of the pages of this deposition,</p> <p>10 do hereby certify it to be a true and</p> <p>11 correct transcript, subject to the</p> <p>12 corrections, if any, shown on the attached</p> <p>13 page.</p> <p>14</p> <p>15 _____</p> <p>16 ROBERT H. KOHN</p> <p>17</p> <p>18</p> <p>19</p> <p>20 Sworn and subscribed to before me,</p> <p>21 this _____ day of _____, 2018.</p> <p>22 _____</p> <p>23 Notary Public</p> <p>24</p> <p>25</p>	<p style="text-align: right;">Page 753</p> <p>1</p> <p>2 INDEX</p> <p>3 WITNESS PAGE</p> <p>4 ROBERT H. KOHN</p> <p>5 Examination by:</p> <p>6 MR. ZAKARIN 4</p> <p>7 MR. HWANG 547</p> <p>8</p> <p>9 EXHIBITS</p> <p>10 K PAGE</p> <p>11 Exhibit 1 Expert Report of Bob Kohn, August 15</p> <p>12 17, 2018</p> <p>13 Exhibit 2 Blanket Composer Agreement 65</p> <p>14 (Direct) dated as of May 19, 2010</p> <p>15 Exhibit 3 March 7, 2011 Agreement 147</p> <p>16 Exhibit 4 Excerpt from the book entitled, 201</p> <p>17 Kohn On Music Licensing</p> <p>18 Exhibit 5 Document entitled, Turner - BMI 339</p> <p>19 Music Performance License</p> <p>20 Agreement</p> <p>21 Exhibit 6 Excerpt from the book entitled, 493</p> <p>22 Kohn On Music Licensing</p> <p>23 Exhibit 7 Excerpts from the book entitled, 613</p> <p>24 Kohn On Music Licensing</p> <p>25 Exhibit 8 Form 8.2, Multi-Purpose Work For 631</p> <p>26 Hire Agreement</p> <p>27 Exhibit 9 Multi-page document containing 695</p> <p>28 cue sheets</p> <p>29 Exhibit 10 Printout from IMDB.com of all 20 699</p> <p>30 episodes from the two seasons of</p> <p>31 the show Ain't That America</p> <p>32 Exhibit 11 Cue sheets corresponding to K 699</p> <p>33 Exhibit 10</p> <p>34 Exhibit 12 Document, Bates-stamped 730</p> <p>35 VIACOM_0000568 through 667</p>

189 (Pages 750 - 753)

Page 754

INSTRUCTIONS TO WITNESS

1
2
3 Please read your deposition over carefully
4 and make any necessary corrections. You should state
5 the reason in the appropriate space on the errata
6 sheet for any corrections that are made.
7 After doing so, please sign the errata sheet
8 and date it.
9 You are signing same subject to the changes
10 you have noted on the errata sheet, which will be
11 attached to your deposition.
12 It is imperative that you return the original
13 errata sheet to the deposing attorney within thirty
14 (30) days of receipt of the deposition transcript by
15 you. If you fail to do so, the deposition transcript
16 may be deemed to be accurate and may be used in court.
17
18
19
20
21
22
23
24
25

Page 755

E R R A T A

1
2
3
4
5 I wish to make the following changes,
6 for the following reasons:
7
8 PAGE LINE
9 _____ CHANGE: _____
10 REASON: _____
11 _____ CHANGE: _____
12 REASON: _____
13 _____ CHANGE: _____
14 REASON: _____
15 _____ CHANGE: _____
16 REASON: _____
17 _____ CHANGE: _____
18 REASON: _____
19
20 _____
21 ROBERT H. KOHN DATE _____
22 SUBSCRIBED AND SWORN TO BEFORE
23 ME THIS ____ DAY OF _____, 201 .
24
25 _____
NOTARY PUBLIC COMMISSION EXPIRES

190 (Pages 754 - 755)

Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

DISCLAIMER: THE FOREGOING FEDERAL PROCEDURE RULES ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.

THE ABOVE RULES ARE CURRENT AS OF SEPTEMBER 1, 2016. PLEASE REFER TO THE APPLICABLE FEDERAL RULES OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

Veritext Legal Solutions complies with all federal and State regulations with respect to the provision of court reporting services, and maintains its neutrality and independence regardless of relationship or the financial outcome of any litigation. Veritext requires adherence to the foregoing professional and ethical standards from all of its subcontractors in their independent contractor agreements.

Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at www.veritext.com.

Exhibit B(2)

<p style="text-align: right;">Page 1</p> <p>1 2 UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK 3 -----X 4 TWELVE SIXTY LLC, ARON MARDEROSIAN, and ROBERT MARDEROSIAN, 5 6 Plaintiffs, 7 8 vs. Civil Action No. 1:17-CV-01479-PAC 9 EXTREME MUSIC LIBRARY LIMITED, a division of Sony/ATV Music Publishing; EXTREME MUSIC LIMITED; VIACOM INTERNATIONAL INC., NEW CREATIVE MIX INC., HYPE PRODUCTION MUSIC, 10 Defendants. 11 -----X 12 13 14 15 VOLUME II 16 CONTINUED DEPOSITION OF 17 ROBERT H. KOHN 18 New York, New York 19 Friday, November 2, 2018 20 21 22 23 24 Reported by: JOAN WARNOCK 25 JOB NO. J3015335A</p>	<p style="text-align: right;">Page 3</p> <p>1 2 A P P E A R A N C E S: 3 4 MARDEROSIAN & COHEN, 5 A Professional Corporation 6 Attorneys for Plaintiffs 7 1260 Fulton Street 8 Fresno, California 93721 9 BY: MICHAEL G. MARDEROSIAN, ESQ. 10 HEATHER S. COHEN, ESQ. 11 12 PRYOR CASHMAN LLP 13 Attorneys for Defendants Extreme Music 14 Library Limited and Extreme Music Limited 15 7 Times Square 16 New York, New York 10036 17 BY: DONALD S. ZAKARIN, ESQ. 18 ROSS M. BAGLEY, ESQ. 19 YEVGENIA S. KLEINER, ESQ. 20 21 22 23 24 25</p>
<p style="text-align: right;">Page 2</p> <p>1 2 3 November 2, 2018 4 9:10 a.m. 5 6 VOLUME II - Continued deposition of 7 ROBERT H. KOHN, held at the offices of 8 Pryor Cashman LLP, 7 Times Square, 9 New York, New York, pursuant to Notice, 10 before Joan Warnock, a Notary Public of 11 the State of New York. 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 2 A P P E A R A N C E S: (Cont'd.) 3 4 LOEB & LOEB LLP 5 Attorneys for Defendants Viacom 6 International Inc., New Creative 7 Mix Inc., and Hype Production Music 8 345 Park Avenue 9 New York, New York 10154 10 BY: WOOK J. HWANG, ESQ. 11 ERIN SMITH DENNIS, ESQ. 12 13 14 ALSO PRESENT: 15 DAVID J. PRZYGODA, SONY CORPORATION OF 16 AMERICA 17 BARRY MASSARSKY 18 19 20 21 22 23 24 25</p>

<p style="text-align: right;">Page 5</p> <p>1 R. Kohn</p> <p>2 ROBERT H. KOHN, called as a</p> <p>3 witness, having been duly sworn by</p> <p>4 a Notary Public, was examined and</p> <p>5 testified further as follows:</p> <p>6 COURT REPORTER: Please state your</p> <p>7 name for the record.</p> <p>8 THE WITNESS: Robert H. Kohn.</p> <p>9 EXAMINATION (Cont'd.)</p> <p>10 BY MR. HWANG:</p> <p>11 Q. Good morning, Mr. Kohn.</p> <p>12 A. Good morning.</p> <p>13 Q. You recall the instructions from</p> <p>14 yesterday?</p> <p>15 A. The instructions?</p> <p>16 Q. Yes. The instructions, namely,</p> <p>17 that we shouldn't speak over each other?</p> <p>18 A. Oh, the admonitions.</p> <p>19 Q. Right.</p> <p>20 A. Yes.</p> <p>21 Q. Let's try not to do that for the</p> <p>22 sake of the reporter. So, Mr. Kohn,</p> <p>23 throughout your report you raised several</p> <p>24 instances in which -- several bases for</p> <p>25 contending that the Marderosians may not have</p>	<p style="text-align: right;">Page 7</p> <p>1 R. Kohn</p> <p>2 Q. So other than in the case of direct</p> <p>3 public performance licenses, there's no</p> <p>4 obligation from Viacom, New Creative, or</p> <p>5 Extreme to pay any public performance</p> <p>6 royalties to the Marderosians; correct?</p> <p>7 MR. MARDEROSIAN: Objection. Calls</p> <p>8 for a legal conclusion.</p> <p>9 A. They have an obligation to pay BMI.</p> <p>10 BMI pays the Marderosians.</p> <p>11 Q. Okay. And that payment to BMI from</p> <p>12 Viacom would be in the form of a blanket</p> <p>13 license fee?</p> <p>14 A. Yes.</p> <p>15 Q. Pursuant to the separate agreement</p> <p>16 between BMI and Viacom --</p> <p>17 A. That's correct.</p> <p>18 Q. -- correct?</p> <p>19 MR. MARDEROSIAN: Objection. Calls</p> <p>20 for a legal opinion.</p> <p>21 Q. Have you undertaken any analysis to</p> <p>22 determine how much the Marderosians were</p> <p>23 purportedly underpaid in the writer's share</p> <p>24 of public performance income?</p> <p>25 A. No. I was not asked to opine on</p>
<p style="text-align: right;">Page 6</p> <p>1 R. Kohn</p> <p>2 received their full entitlement to public</p> <p>3 performance royalties. Is that an accurate</p> <p>4 characterization?</p> <p>5 A. May not have received their --</p> <p>6 okay. Yes.</p> <p>7 Q. From BMI; right?</p> <p>8 A. Yeah. Well, may not have received</p> <p>9 their public performance royalties.</p> <p>10 Q. There's no obligation from Viacom,</p> <p>11 New Creative, or Extreme to pay the public</p> <p>12 performance royalties; right?</p> <p>13 MR. MARDEROSIAN: Objection. Calls</p> <p>14 for a legal conclusion.</p> <p>15 A. Well, to the extent they issued</p> <p>16 direct performance licenses, they need to do</p> <p>17 that.</p> <p>18 Q. As a share of the gross receipts,</p> <p>19 as that term is defined --</p> <p>20 A. As gross receipts, right.</p> <p>21 Q. As that term is defined in the 2011</p> <p>22 --</p> <p>23 A. Yes.</p> <p>24 Q. -- Composer Agreement?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 8</p> <p>1 R. Kohn</p> <p>2 that.</p> <p>3 Q. So you don't actually know if they</p> <p>4 were underpaid?</p> <p>5 A. There's enough evidence that I've</p> <p>6 seen in this case that suggest they were</p> <p>7 underpaid.</p> <p>8 Q. But you don't know how much?</p> <p>9 A. I don't know how much.</p> <p>10 Q. And you're not opining on how much?</p> <p>11 A. No. That's correct. I mean yes, I</p> <p>12 am not opining on how much.</p> <p>13 Q. If the Marderosians weren't paid</p> <p>14 public performance income for a particular</p> <p>15 use, does that necessarily mean that a cue</p> <p>16 sheet wasn't submitted to BMI?</p> <p>17 MR. MARDEROSIAN: Objection.</p> <p>18 Incomplete hypothetical.</p> <p>19 A. I agree with that. I agree that</p> <p>20 it's an incomplete hypothetical. Does it</p> <p>21 necessarily mean?</p> <p>22 Q. Someone's going to have to explain</p> <p>23 to me what that is at some point. But go</p> <p>24 ahead.</p> <p>25 A. There was a song -- well, you'll</p>



<p style="text-align: right;">Page 37</p> <p>1 R. Kohn</p> <p>2 royalties can be traced back to the failure</p> <p>3 to timely register work with BMI?</p> <p>4 MR. MARDEROSIAN: Wook, I think he</p> <p>5 answered the question.</p> <p>6 MR. HWANG: Objection noted.</p> <p>7 A. What I could say is that I might</p> <p>8 have seen it in the course of the past eight</p> <p>9 months of working on this case. Sitting here</p> <p>10 right now, I would need something to refresh</p> <p>11 my recollection if I knew it at some point,</p> <p>12 but right now I can't point to you a missing</p> <p>13 payment in a BMI statement, all right, that</p> <p>14 could be traced to a specific eleven-month</p> <p>15 delay in registrations when those works were</p> <p>16 being broadcast.</p> <p>17 Q. Okay.</p> <p>18 A. I mean it's -- go ahead. Go ahead.</p> <p>19 Q. Direct your attention to --</p> <p>20 A. I would have --</p> <p>21 Q. -- page 45 of your report.</p> <p>22 MR. MARDEROSIAN: Was there</p> <p>23 something else you wanted to add?</p> <p>24 THE WITNESS: Yeah.</p> <p>25 A. I'm trying to think about -- you</p>	<p style="text-align: right;">Page 39</p> <p>1 R. Kohn</p> <p>2 MR. ZAKARIN: Actually, I'm not</p> <p>3 trying to intimidate --</p> <p>4 MR. MARDEROSIAN: Well, your facial</p> <p>5 reaction is a manifestation --</p> <p>6 A. I do know that Dan Pounder said in</p> <p>7 his deposition, and this is true, that they</p> <p>8 started using TuneSat in 2008. They weren't</p> <p>9 using it for the purposes of usage, which</p> <p>10 they could have. They were using it for</p> <p>11 other purposes. So Extreme is sitting with</p> <p>12 the data today that would help me make the</p> <p>13 determination as to whether there were</p> <p>14 detections on TuneSat that were a direct</p> <p>15 result of the late registration.</p> <p>16 Q. Okay.</p> <p>17 A. And I have not done it because I</p> <p>18 don't -- I wasn't asked to do it, and we</p> <p>19 haven't been given the data necessary to do</p> <p>20 it, because we don't have the data. We only</p> <p>21 have data going back to 2013.</p> <p>22 Q. Okay. Let me direct your attention</p> <p>23 to page 45 of your report. Are you there?</p> <p>24 A. 45. Yes, I'm here.</p> <p>25 Q. There's a paragraph that reads,</p>
<p style="text-align: right;">Page 38</p> <p>1 R. Kohn</p> <p>2 asked me could that be done. It could be</p> <p>3 done, but you would have to go back and get</p> <p>4 the TuneSat data from 2010 to 2011 or the</p> <p>5 TuneSat data on all of these broadcasts,</p> <p>6 right, all these public performances during</p> <p>7 the time frame that the registrations were</p> <p>8 delayed in order to perform that. Now,</p> <p>9 Extreme has the data. I mean in</p> <p>10 Mr. Massarsky's report there's a chart that</p> <p>11 shows that giving us data, a summary chart</p> <p>12 going back two years. But according to Dan</p> <p>13 Pounder's deposition, he says that they've</p> <p>14 been using TuneSat dating back to 2008. So</p> <p>15 Extreme has all of the broadcast data</p> <p>16 necessary in order for me to answer your</p> <p>17 question, but that hasn't been produced in</p> <p>18 this litigation. And I do believe it's been</p> <p>19 asked. Don just said it's not true.</p> <p>20 THE WITNESS: But what is not true?</p> <p>21 Q. Okay. Let's --</p> <p>22 MR. MARDEROSIAN: Don't worry.</p> <p>23 He's shaking his head. He's just trying</p> <p>24 to intimidate you. Don't worry about</p> <p>25 it.</p>	<p style="text-align: right;">Page 40</p> <p>1 R. Kohn</p> <p>2 "The retitling mess compounded the</p> <p>3 registration problems," dot dot dot, "and</p> <p>4 ultimately Aron and Robert's writer share of</p> <p>5 public performance royalties." Do you see</p> <p>6 that?</p> <p>7 A. Well, read the dot, dot, dot. So</p> <p>8 it says from the beginning of the sentence,</p> <p>9 "The retitling mess compounded the</p> <p>10 registration problems, including the</p> <p>11 inexcusable delay in registrations, and may</p> <p>12 have affected the accuracy of cue sheets and</p> <p>13 ultimately Aron and Robert's writer's share</p> <p>14 of public performance royalties discussed</p> <p>15 below." Go ahead.</p> <p>16 Q. Okay. I'm glad you read that,</p> <p>17 because I read a sentence fragment. So if I</p> <p>18 can just focus on the retitling mess that you</p> <p>19 you're referring to here.</p> <p>20 A. Yes.</p> <p>21 Q. In sum and substance, you're saying</p> <p>22 the retitling mess may have affected</p> <p>23 adversely Aron and Robert's receipt of the</p> <p>24 writer's share of public performance income?</p> <p>25 A. Right.</p>



<p style="text-align: right;">Page 41</p> <p>1 R. Kohn</p> <p>2 Q. So when you say may, you don't</p> <p>3 actually know if it did; right?</p> <p>4 A. Well, the evidence shows --</p> <p>5 MR. MARDEROSIAN: Again, it's</p> <p>6 calling for speculation again. Same</p> <p>7 reasons as before.</p> <p>8 MR. HWANG: The reason I'm calling</p> <p>9 for speculation is because he's</p> <p>10 speculating in his report.</p> <p>11 MR. MARDEROSIAN: No. Not true.</p> <p>12 Q. Go ahead.</p> <p>13 MR. MARDEROSIAN: It's because the</p> <p>14 data's available but you haven't</p> <p>15 produced it to show that these</p> <p>16 nonpayments are due to Russell's</p> <p>17 retitling of the songs.</p> <p>18 Q. When you say the retitling --</p> <p>19 MR. MARDEROSIAN: But I don't think</p> <p>20 I have to prove that for breach of</p> <p>21 contract in any event. I just have to</p> <p>22 show other issues.</p> <p>23 MR. HWANG: We know you think you</p> <p>24 have no burden of proof in this case.</p> <p>25 MR. MARDEROSIAN: No. I didn't say</p>	<p style="text-align: right;">Page 43</p> <p>1 R. Kohn</p> <p>2 version and could have resulted in the</p> <p>3 original payment of the Land Rover royalties</p> <p>4 to Phoenix and Bergerson, which were the</p> <p>5 result of, I believe, their being misnamed in</p> <p>6 cue sheets that caused the misdirection of</p> <p>7 those performance royalties.</p> <p>8 Q. Okay. Other than the Land Rover</p> <p>9 example, is there any other example that you</p> <p>10 can identify?</p> <p>11 MR. MARDEROSIAN: Objection. Calls</p> <p>12 for speculation.</p> <p>13 A. I might have seen others, but</p> <p>14 nothing comes to mind right now.</p> <p>15 Q. They're not identified in your</p> <p>16 report either, right, other than the Land</p> <p>17 Rover example?</p> <p>18 A. My report speaks for itself. I</p> <p>19 don't want to start reading it.</p> <p>20 Q. But sitting here today, you can't</p> <p>21 identify any others?</p> <p>22 A. Sitting here right now, that's the</p> <p>23 one that comes to mind.</p> <p>24 Q. That's the only one that comes to</p> <p>25 mind; right?</p>
<p style="text-align: right;">Page 42</p> <p>1 R. Kohn</p> <p>2 that. You're misquoting me.</p> <p>3 Q. The retitling mess may have</p> <p>4 adversely affected Aron and Robert's receipt</p> <p>5 of the writer's share of public performance</p> <p>6 royalties. That's what this says,</p> <p>7 effectively; right?</p> <p>8 A. Yes, that's what it -- it says what</p> <p>9 it says.</p> <p>10 Q. Are you aware of a single instance</p> <p>11 in which the quote, unquote, retitling mess</p> <p>12 can be traced as the cause of Aron and</p> <p>13 Robert's non-receipt of any public</p> <p>14 performance royalties?</p> <p>15 MR. MARDEROSIAN: I'm going to</p> <p>16 object. It calls for speculation.</p> <p>17 Incomplete hypothetical.</p> <p>18 A. In my opinion, the failure to</p> <p>19 retitle Mulholland Drive, which was a</p> <p>20 duplicate of another song in the Extreme</p> <p>21 catalog, could ultimately have resulted in</p> <p>22 people requesting Mulholland Drive for</p> <p>23 synchronization and using the Phoenix</p> <p>24 Bergerson, I don't know how to spell</p> <p>25 Bergerson, version instead of Rob and Aron's</p>	<p style="text-align: right;">Page 44</p> <p>1 R. Kohn</p> <p>2 MR. MARDEROSIAN: Object. It calls</p> <p>3 for speculation. Incomplete</p> <p>4 hypothetical.</p> <p>5 Q. Please speculate as to what comes</p> <p>6 to mind.</p> <p>7 MR. MARDEROSIAN: Sorry?</p> <p>8 Q. I said please speculate as to what</p> <p>9 comes to your mind.</p> <p>10 MR. MARDEROSIAN: He's not going to</p> <p>11 speculate.</p> <p>12 A. I'm not going to speculate.</p> <p>13 Q. That was a rhetorical question.</p> <p>14 I'm not asking you to speculate. I'm asking</p> <p>15 you what's in your head right now.</p> <p>16 A. What's in my head right -- you've</p> <p>17 asked --</p> <p>18 MR. MARDEROSIAN: Hold on. The</p> <p>19 question is vague, overbroad. You're</p> <p>20 asking him to speculate. It's an</p> <p>21 incomplete hypothetical.</p> <p>22 Q. That's the only example, the Land</p> <p>23 Rover example is the only example that comes</p> <p>24 to mind sitting here today as to an instance</p> <p>25 in which you believe the quote, unquote,</p>



<p style="text-align: right;">Page 45</p> <p>1 R. Kohn</p> <p>2 retitling mess can be traced as the cause of</p> <p>3 any non-receipt of public performance</p> <p>4 royalties to Aron and Robert; correct?</p> <p>5 MR. MARDEROSIAN: I'm going to</p> <p>6 object.</p> <p>7 Q. Correct?</p> <p>8 MR. MARDEROSIAN: I'm going to</p> <p>9 object. You're asking him to speculate.</p> <p>10 It's an incomplete hypothetical. You</p> <p>11 want him to identify a specific</p> <p>12 nonpayment due to a retitling issue.</p> <p>13 And that's asking him to speculate. And</p> <p>14 it's an incomplete hypothetical.</p> <p>15 A. That comes to mind as we discussed</p> <p>16 it yesterday, and it's very foremost in my</p> <p>17 mind, and that's the one that's in my mind</p> <p>18 right now. I can't think of any others right</p> <p>19 now.</p> <p>20 Q. Okay. That's good enough. Let's</p> <p>21 move on to the direct public performance</p> <p>22 licenses.</p> <p>23 A. Okay.</p> <p>24 Q. For the sake of speeding this up --</p> <p>25 well, you know what, I don't want to do that.</p>	<p style="text-align: right;">Page 47</p> <p>1 R. Kohn</p> <p>2 generated, would probably be generated for a</p> <p>3 song that was subject to a direct performance</p> <p>4 license.</p> <p>5 Q. Okay. In which case there's no</p> <p>6 harm to a composer; right? They would still</p> <p>7 receive the writer's share of the public</p> <p>8 performance royalties with respect to the</p> <p>9 song as to which a direct public performance</p> <p>10 license had been granted under your</p> <p>11 hypothetical; correct?</p> <p>12 A. I'm not certain about that. That</p> <p>13 depends upon BMI's systems in this case or</p> <p>14 ASCAP's systems in terms of whether it knows</p> <p>15 that a song was subject to a direct</p> <p>16 performance license or not.</p> <p>17 Q. Okay. Let me make this clear. A</p> <p>18 direct public performance license means with</p> <p>19 respect to any particular song, that it</p> <p>20 doesn't have to be reported on a cue sheet to</p> <p>21 BMI. Is that your understanding?</p> <p>22 MR. MARDEROSIAN: I'm going to</p> <p>23 object. It's vague. It's an incomplete</p> <p>24 hypothetical.</p> <p>25 A. I don't know what BMI and ASCAP's</p>
<p style="text-align: right;">Page 46</p> <p>1 R. Kohn</p> <p>2 MR. MARDEROSIAN: Well, it's 9:54.</p> <p>3 How much more time do you estimate here?</p> <p>4 MR. HWANG: Let's go off the</p> <p>5 record.</p> <p>6 (Discussion off the record.)</p> <p>7 Q. So, Mr. Kohn, when a licensee has a</p> <p>8 direct public performance license, that</p> <p>9 obviates the need to submit cue sheets to</p> <p>10 BMI. Is that an accurate statement?</p> <p>11 A. It should. Well, let me rephrase</p> <p>12 that. I think the answer is no, because, let</p> <p>13 me explain why, when you have a program,</p> <p>14 let's say it has, and I'm creating a</p> <p>15 hypothetical, that's got ten musical works in</p> <p>16 it. Only one of the songs might be subject</p> <p>17 to a direct performance license. So a cue</p> <p>18 sheet would probably be generated for the</p> <p>19 purposes of that program to include not only</p> <p>20 the nine songs that are in the program that</p> <p>21 are not subject to a direct performance</p> <p>22 license, but would also include a song that</p> <p>23 is subject to a direct performance license.</p> <p>24 I don't think the systems are -- well,</p> <p>25 whatever. So I think a cue sheet would be</p>	<p style="text-align: right;">Page 48</p> <p>1 R. Kohn</p> <p>2 policies are with respect to that, because</p> <p>3 their contracts say that you must -- it</p> <p>4 doesn't say in here -- well, I'd have to read</p> <p>5 this entire contract again, but I --</p> <p>6 Q. Mr. Kohn, you're aware of the</p> <p>7 consent decree; right? You talked about that</p> <p>8 yesterday?</p> <p>9 A. Oh, but that's completely -- yeah.</p> <p>10 So you want to go back to music publishers</p> <p>11 and music --</p> <p>12 Q. No, no, I don't want to go back. I</p> <p>13 want to --</p> <p>14 A. Okay, then don't.</p> <p>15 Q. -- streamline this.</p> <p>16 A. It's totally irrelevant to what I'm</p> <p>17 saying.</p> <p>18 Q. You're opining on the negative</p> <p>19 adverse effect of a purported direct public</p> <p>20 performance license that you think has been</p> <p>21 granted to Viacom. Is that an accurate</p> <p>22 statement as to the contents of your report?</p> <p>23 A. The contents of my report, Viacom</p> <p>24 was -- had received clearly a direct blanket</p> <p>25 synchronization license to everything covered</p>



<p style="text-align: right;">Page 113</p> <p>1 R. Kohn</p> <p>2 Q. Teenage Vamps.</p> <p>3 A. Not on Teenage Vamps, but on</p> <p>4 Mulholland Drive --</p> <p>5 Q. That's the only question. Did I</p> <p>6 ask you about Mulholland Drive?</p> <p>7 A. I saw 60 pages of Mulholland Drive</p> <p>8 promotional announcements that Bayham was</p> <p>9 paid on, and they were not paid. And when I</p> <p>10 see 60 pages where Bayham is paid and are</p> <p>11 clearly identified and associated with the</p> <p>12 plaintiffs and not in the BMI statements, the</p> <p>13 only thing I can imagine is that there are</p> <p>14 other composers who were paid on those works.</p> <p>15 That's what I was focused on. Teenage Vamps</p> <p>16 was just a matter of the fact that you</p> <p>17 provided a report that didn't include it.</p> <p>18 Q. Is it possible you have a limited</p> <p>19 imagination?</p> <p>20 A. I think that's an insulting</p> <p>21 question.</p> <p>22 Q. I'll withdraw the question. You</p> <p>23 just said the only thing that you can imagine</p> <p>24 is that there was some, you know, some change</p> <p>25 in the data or it was misdirected; is that</p>	<p style="text-align: right;">Page 115</p> <p>1 R. Kohn</p> <p>2 asked him a question.</p> <p>3 A. Based on everything I've seen in</p> <p>4 this case, I have asked for and I have not</p> <p>5 seen the royalty statements that Russell</p> <p>6 Emanuel and under all of his aliases have</p> <p>7 received through ASCAP, PRS so I can make an</p> <p>8 absolute determination which composers</p> <p>9 received those royalties. And if you would</p> <p>10 show us those and be transparent about it,</p> <p>11 and perhaps Sony ATV might be very interested</p> <p>12 in knowing whether that's the case, because</p> <p>13 if it turns out to be the case, we all have</p> <p>14 problems.</p> <p>15 Q. Okay. Now that you just finished</p> <p>16 that long statement, the question was not</p> <p>17 what you didn't see, what you didn't get to</p> <p>18 see, whether you were entitled to see it. My</p> <p>19 question was much simpler.</p> <p>20 A. I answered your question.</p> <p>21 Q. Then what was the speech for?</p> <p>22 A. That was my answer.</p> <p>23 Q. I don't think I asked anything</p> <p>24 relating to that.</p> <p>25 MR. ZAKARIN: I have no further</p>
<p style="text-align: right;">Page 114</p> <p>1 R. Kohn</p> <p>2 right?</p> <p>3 A. It's a figure of speech. I said</p> <p>4 earlier --</p> <p>5 Q. Oh. It's a figure of speech when</p> <p>6 you say it's the only thing you can imagine.</p> <p>7 Let me just try it. Other --</p> <p>8 MR. MARDEROSIAN: You're getting</p> <p>9 argumentative, Don. Argumentative.</p> <p>10 Q. Are there other possibilities that</p> <p>11 you could imagine, Mr. Kohn?</p> <p>12 MR. MARDEROSIAN: He's not going to</p> <p>13 speculate. He's not going to speculate.</p> <p>14 MR. ZAKARIN: That's all he's done</p> <p>15 today.</p> <p>16 MR. MARDEROSIAN: Incorrect.</p> <p>17 That's an argumentative and insulting</p> <p>18 statement. And I object to that.</p> <p>19 MR. ZAKARIN: It's an accurate</p> <p>20 statement.</p> <p>21 A. I would like to see, given what --</p> <p>22 MR. MARDEROSIAN: It's based on the</p> <p>23 evidence that you've produced in the</p> <p>24 case.</p> <p>25 MR. ZAKARIN: I understand. I've</p>	<p style="text-align: right;">Page 116</p> <p>1 R. Kohn</p> <p>2 questions.</p> <p>3 MR. MARDEROSIAN: Thank you, Don.</p> <p>4 Are we done?</p> <p>5 MR. HWANG: Close it out.</p> <p>6 MR. MARDEROSIAN: Same stipulation</p> <p>7 as we reached with the other experts</p> <p>8 where I get the original, notify you of</p> <p>9 any changes. We good with that?</p> <p>10 MR. ZAKARIN: Yes.</p> <p>11 (Time noted: 11:00 a.m.)</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16 _____</p> <p>17 ROBERT H. KOHN</p> <p>18</p> <p>19 Subscribed and sworn to before me</p> <p>20 this ____ day of _____, 2018.</p> <p>21 _____</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>



Page 117

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATE

STATE OF NEW YORK)

: ss.

COUNTY OF WESTCHESTER)

I, JOAN WARNOCK, a Notary Public

within and for the State of New York, do

hereby certify:

That ROBERT H. KOHN, the witness

whose deposition is hereinbefore set

forth, was duly sworn by me and that

such deposition is a true record of the

testimony given by the witness.

I further certify that I am not

related to any of the parties to this

action by blood or marriage, and that I

am in no way interested in the outcome

of this matter.

IN WITNESS WHEREOF, I have hereunto

set my hand this 8th day of November,

2018.

Joan Warnock

JOAN WARNOCK

Page 119

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Deposition

EXHIBIT K-16 80

Subextract taken from extract

produced by Extreme, Exhibit 8 to

Katz Deposition

EXHIBIT K-17 87

Spread sheet produced by Extreme

setting forth performance value of

Aron and Robert's songs compared to

other songs

EXHIBIT K-18 92

Six-page document beginning with

Bates stamp Extreme 0083277,

Excerpts of Semiannual Statements

Page 118

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

----- I N D E X -----

WITNESS EXAMINATION BY PAGE

R. Kohn Mr. Hwang 5

Mr. Marderosian 78

Mr. Hwang 96

Mr. Zakarin 106

----- INFORMATION REQUESTS -----

DIRECTIONS:

RULINGS:

TO BE FURNISHED:

REQUESTS:

MOTIONS:

----- EXHIBITS -----

DEFENDANTS' FOR ID.

EXHIBIT K-13 64

Expert Report of Roger Miller

EXHIBIT K-14 73

First Amended Complaint for Damages

and Demand for Jury Trial

EXHIBIT K-15 79

Document Bates stamped Extreme

0006585, Exhibit 7 to Mr. Katz's

Page 120

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

DEPOSITION ERRATA SHEET

Our Assignment No.: J3015335A

Case Caption: Twelve Sixty LLC vs. Extreme

Music Library Limited

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury

that I have read the entire transcript of my

Deposition taken in the captioned matter or

the same has been read to me, and the same is

true and accurate, save and except for

changes and/or corrections, if any, as

indicated by me on the DEPOSITION ERRATA

SHEET hereof, with the understanding that I

offer these changes as if still under oath.

Robert H. Kohn

Subscribed and sworn to on the ____ day of

_____, 20 ____ before me.

Notary Public,

in and for the State of

_____.

Page 121

1 DEPOSITION ERRATA SHEET

2 Page No. ____ Line No. ____ Change to: _____

3 _____

4 Reason for change: _____

5 Page No. ____ Line No. ____ Change to: _____

6 _____

7 Reason for change: _____

8 Page No. ____ Line No. ____ Change to: _____

9 _____

10 Reason for change: _____

11 Page No. ____ Line No. ____ Change to: _____

12 _____

13 Reason for change: _____

14 Page No. ____ Line No. ____ Change to: _____

15 _____

16 Reason for change: _____

17 Page No. ____ Line No. ____ Change to: _____

18 _____

19 Reason for change: _____

20 Page No. ____ Line No. ____ Change to: _____

21 _____

22 Reason for change: _____

23 _____

24 SIGNATURE: _____ DATE: _____

25 Robert H. Kohn

Page 122

1 DEPOSITION ERRATA SHEET

2 Page No. ____ Line No. ____ Change to: _____

3 _____

4 Reason for change: _____

5 Page No. ____ Line No. ____ Change to: _____

6 _____

7 Reason for change: _____

8 Page No. ____ Line No. ____ Change to: _____

9 _____

10 Reason for change: _____

11 Page No. ____ Line No. ____ Change to: _____

12 _____

13 Reason for change: _____

14 Page No. ____ Line No. ____ Change to: _____

15 _____

16 Reason for change: _____

17 Page No. ____ Line No. ____ Change to: _____

18 _____

19 Reason for change: _____

20 Page No. ____ Line No. ____ Change to: _____

21 _____

22 Reason for change: _____

23 _____

24 SIGNATURE: _____ DATE: _____

25 Robert H. Kohn



ESQUIRE
DEPOSITION SOLUTIONS